INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provision relied on for jurisdiction	1
State statute involved in case	2
Date of judgment on appeal	18
Nature of case	19
Substantiality of the Federal question	25
Exhibit "A"—Sample copy of bond involved	32
Exhibit "B"—Journal entry of judgment of District Court for Washita County, Oklahoma	33
Exhibit "C"—Opinion of Supreme Court of Oklahoma	35
Exhibit "D"—Analysis of bondholder's rights and the applicable statute	51
Exhibit "E"—Dissenting opinion of Gibson, J.	56

Table of Cases Cited

Charleston Fed. Savings & Loan v. *Alderson*, 324 U. S. 182, 65 Sup. Ct. 624, 89 L. Ed. 857	24
City of Healdton, ex rel. Rewoldt v. *Pickens* (decided by Oklahoma Supreme Court January 6, 1948)	26
County Court of Ralls County v. *U. S. ex rel. Douglas*, 26 L. Ed. 1220	30
Curtis v. *Whitney*, 80 U. S. 513	29
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239, 42 Sup. Ct. 106	24
Davis v. *McCasland*, 182 Okla. 49, 75 P. (2d) 1118	25
Hann v. *City of Clinton*, 131 F. (2d) 978	25, 30
Jett Bros. Distilling Co. v. *Carrollton*, 252 U. S. 1, 64 L. Ed. 421	24
Louisiana, ex rel. Hubert v. *New Orleans*, 215 U. S. 170, 54 L. Ed. 144, 30 Sup. Ct. 40	25, 30
Louisiana, ex rel. Nelson v. *Police Jury*, 28 L. Ed. 574	30

Page

Memphis Nat. Gas Co. v. *Beiler*, 315 U. S. 649, 62 Sup. Ct. 857, 86 L. Ed. 1090 24
Moore v. *Otis*, 275 Fed. 747 25
Nelson v. *Pitts*, 126 Okla. 191, 259 Pac. 533 25
Rees v. *Watertown*, 19 Wall. 107, 22 L. Ed. 72 30
Seibert v. *Lewis*, 122 U. S. 284, 30 L. Ed. 1161 30
Straughan v. *Berry*, 179 Okla. 364, 65 P. (2d) 1203 25
Terry v. *Anderson*, 95 U. S. 365 29
United States v. *Morena*, 245 U. S. 392 29
United States, ex rel. Wolff v. *City of New Orleans*, 103 U. S. 358, 26 L. Ed. 395 30
Von Hoffman v. *Quincy*, 4 Wall. 535, 18 L. Ed. 403 ..... 25, 30
Western Turf Association v. *Greenberg*, 204 U. S. 359, 27 Sup. Ct. 384, 51 L. Ed. 520 24
Wheeler v. *Jackson*, 137 U. S. 662 26
Worthen Co. v. *Kavanaugh*, 79 L. Ed. 638, 55 Sup. Ct. 555, 97 A.L.R. 905 ..... 25, 30

STATUTES CITED

Constitution of the United States:
Article I, Section 10 19
Fourteenth Amendment 19
Judicial Code, Section 237(a) (28 U.S.C.A. 344), as amended by the Act of February 13, 1925 (Ch. 229, 43 Stat. 936, 937; 28 U.S.C.A. 344); Act of January 31, 1928, Ch. 14, 45 Stat. 54, as amended by the Act of April 26, 1928, Ch. 440, 45 Stat. 466 (28 U.S.C.A. 861a and 861b) 1, 2, 24
Oklahoma Statutes Annotated, Title 11, Sections 242 to 242-o, inclusive 18, 19, 20

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 618

A. F. REEDER,

Appellant,

vs.

W. F. BANKS: ERNEST MORRIS, COUNTY TREASURER OF WASHITA COUNTY, OKLAHOMA

STATEMENT AS TO JURISDICTION ON APPEAL

Comes Now the Appellant, A. F. Reeder, and upon the presentation of his petition for the allowance of an appeal to this Court, respectfully presents this statement disclosing the basis upon which he contends that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

(A) Statutory Provision Relied On for Jurisdiction

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States in this matter is Section 237 (a) of the Judicial Code (28 U. S. C. A., Sec. 344), as amended by the Act of February 13, 1925 (Ch. 229, 43 Stat. 936, 937; 28 U. S. C. A., Sec. 344).

Act of January 31, 1928; Ch. 14, 45 Stat. 54, as amended by the Act of April 26, 1928, Ch. 440, 45 Stat. 466 (28 U. S. C. A., Secs. 861a, 861b), and more particularly the language of said statutory provision which reads as follows:

> "A final judgment * * * in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal * * *."

(B) State Statute Involved in Case

The statute of the State of Oklahoma, the validity of which is involved is:

> "SENATE BILL No. 164
>
> AN ACT fixing limitations upon the time in which the lien of 'Street Improvement Bonds' issued under authority of chapter 10, Article 12, Oklahoma Revised Laws of 1910, and of 'Street Improvement Bonds' or of 'Refunding Street Improvement Bonds' issued under authority contained in Chapter 33, Article 14, Oklahoma Statutes of 1931, and statutes supplementary and amendatory thereto, may be enforced by court action or otherwise; providing a method for refunding said bonds and making it the mandatory duty of the governing boards of cities and towns and of the clerks and treasurers of cities and towns to do certain things in connection therewith; providing for the designation, term, place of payment, rate of interest, execution, and other details of the refunding bonds and that said bonds or the coupons attached may be used as cash in the payment of special assessment obligations against which said refunding bonds are issued; providing for reassessment of property liable for the bonds after notice has been given and protest period has elapsed and fixing the rate of interest on said reassessments; provid-

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ing for the collection of reassessment installments, the disposition thereof, and for penalties in event of delinquency; making the refunding bonds a lien co-equal with that of other taxes; providing for foreclosure of the lien of said bonds in certain cases; prescribing rules for construction of this Act; and declaring an emergency.

Be It Enacted By the People of the State of Oklahoma:

Section 1. Street Improvement Bonds—Refunding Street Improvement Bonds—Actions on—Limitation—Saving Clause—Notice by City Clerks to Bondholders of Running of Statute of Limitation.

From and after the effective date of this Act, the right of any holder to enforce the lien of any 'Street Improvement Bond' issued under authority of Chapter 10, Article 12, Oklahoma Revised Laws of 1910, or of any 'Street Improvement Bond' or 'Refunding Street Improvement Bond' issued under any authority contained in Chapter 33, Article 14, Oklahoma Statutes of 1931, and statutes supplementary and amendatory thereto, by foreclosure, mandamus, refunding or otherwise, shall be barred upon the expiration of three years immediately following the maturity date named in the face of such bond, unless the holder of any such bond shall have commenced suit to foreclose his lien by filing an action for that purpose and procuring service of summons therein or shall have evidenced his willingness to accept Street Improvement Refunding Bonds issued under the provisions of this Act, in exchange therefor, prior to the expiration of said three year period of limitation; Provided, however, that in all cases where the period of limitation herein mentioned has expired or will expire prior to November 1, 1939, the holder of such bonds shall have until December 1, 1940, in which to pursue his remedy or obtain the benefits of this Act. The running of the period of limitation herein fixed shall be an absolute bar to any action or proceeding brought thereafter, whether

the same is plead as a defense or not, and the property against which such bonds theretofore represented a lien shall thereafter be, by operation of law, absolved of any lien or liability on account of said bonds.

It shall be the mandatory duty of the city clerk to notify the holders of all outstanding Street Improvement Bonds that the same are about to be barred by the Statute of Limitations, by mailing to the holder of each such bond at his last known address, as shown by the records of said city clerk, and by publication of notice in some newspaper of general circulation in the city or town in which such Street Improvement District is located, and if there be no newspaper published in said city or town, then the publication shall be made in some newspaper published in said county, and by publication thereof in at least one nationally recognized financial journal, which notices shall be mailed and published at least sixty days prior to the expiration of such Statute of Limitation; said notices shall be substantially in the following form:

N*TICE: To All Holders of Street Improvement Bonds of District No. — (or if appropriate, insert the Ordinance or Serial No.) of the City of ——, Oklahoma:

You are hereby notified that on the — day of ——, 19—, the above bonds and rights thereunder will be barred by Statute of Limitation, as provided in Senate Bill 164, Oklahoma Session Laws, 1939. You will govern yourselves accordingly.

—— ——,
City Clerk of the City of ——, Okla.'

Failure of the city clerk to give the notice provided herein shall not impair any of the provisions of this Act.

Section 2. Refunding Street Improvement Bonds—Application of Bondholder.

The holder of any 'Street Improvement Bond' issued under authority of Chapter 10, Article 12, Oklahoma Revised Law of 1910, or of any 'Street Improvement Bond' or 'Refunding Street Improvement Bond'

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issued under any authority contained in Chapter 33, Article 14, Oklahoma Statutes of 1931, and statutes supplementary and amendatory thereto, may at any time after the maturity date stated on the fact of such bonds and before the running of the period of limitation mentioned in Section 1 hereof, file with the city or town clerk of the city or town in which lies the paving district against which his bond is issued, an 'Agreement to Accept Street Improvement Refunding Bonds.' Said instrument shall contain a description of the bond with reference to which it is made, showing at least the amount, the date of issue, date of maturity, amount of delinquent interest, the paving district against which it is a lien and shall recite that the person signing said instrument is the owner or holder of the bond described and is vested with legal authority to execute an agreement to accept, and does thereby agree to accept, Street Improvement Refunding Bonds issued under authority of this Act. Said 'agreement' shall also contain a statement that the owner of the bond or bonds described therein agrees to advance his proportionate share of the cost of such refunding procedure. It shall also contain a request that the governing board of the city or town be notified of the filing of said instrument and that said governing board proceed to refund the bond or bonds described therein in accordance with the provisions of this Act. Said instrument shall not be eligible for filing with the city or town clerk as herein provided unless the maker thereof shall append thereto, his affidavit that all of the statements made therein are true and correct. It shall be the mandatory duty of the city or town clerk to accept said instrument when the same is tendered to him and to file the same in a safe and appropriate place in his office. It shall also be the duty of said clerk to convey the fact of said filing, and the information contained therein, to the governing board of said city or town at its next regular or special meeting. The filing of said instrument shall constitute 'Evidence of Willingness to Accept Street Improvement Refunding Bonds' such as will stop the

running of the period of limitation mentioned in Section 1 hereof but said filing shall also limit the owner of the bond or bonds described in the instrument filed to any remedy other than that made available by this Act, whether the remedy be sought before or after said period of limitation has expired.

Section 3. Mandatory Duty of Governing Board of City.

It shall be the mandatory duty of the governing board of any city or incorporated town, whether governed by special charter or otherwise, to proceed to refund any and all 'Street Improvement Bonds' issued under authority of Chapter 10, Article 12, Oklahoma Revised Laws of 1910, and any and all Street Improvement Bonds or 'Refunding Street Improvement Bonds' issued under any authority contained in Chapter 33, Article 14, Oklahoma Statutes of 1931, and statutes supplementary and amendatory thereto, and the interest due thereon, with respect to which the owners or holders thereof have filed an 'Agreement to Accept Street Improvement Refunding Bonds' as provided in Section 2 of this Act. Said refunding procedure shall not, however, be commenced until the bond or bonds sought to be refunded shall have been matured and past due for at least three years, but shall be commenced within six months after the expiration of said three year period. Said refunding procedure, after commencement, shall be promptly carried out in accordance with the provisions of this Act. In the event that a party or parties own all the outstanding bonds in a Street Improvement District, and have filed an 'Agreement to Accept Street Improvement Refunding Bonds' as provided in this Act, such party or parties may file an application with the Governing Board of such city or town, for Street Improvement Refunding Bonds, as provided in this Act, prior to the expiration of the three year period, and in such event said proceedings for refund shall be commenced within six months after the filing of such application.

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Section 4. Procedure Prescribed.

During the time provided in Section 3 hereof for the commencement of refunding proceedings, the governing board of any city or town shall require from the clerk thereof a written statement showing the total amount of the bonds of any street improvement district with respect to which the owners or holders thereof have filed 'Agreement to Accept Street Improvement Refunding Bonds.' Said statement shall also contain a description of each piece of property in the special assessment district, against which assessments remain due and unpaid and said statement shall show the amount of each unpaid assessment outstanding against each piece of property and the year in which the same came due, together with the amount of interest and penalty due thereon. Said governing board shall examine said statements and if the same are found to be true and correct, it shall enact a resolution declaring the amount of indebtedness due by reason of the total outstanding and unpaid bonds and interest against said special assessment district and that the total amount thereof shall be declared to be the basis of a reassessment against the property liable therefor to pay Street Improvement Refunding Bonds about to be issued under authority of this Act. Said resolution shall recite by number and date of passage the ordinance theretofore enacted levying assessments to pay the bonds about to be refunded, shall describe said obligations about to be refunded and declare the determination of such governing body to cause said bonds to be refunded and to levy reassessments in the amount necessary to pay said bonds and the interest accrued thereon, against the several lots, pieces and parcels of land liable for the cost of the improvement. Said resolution shall likewise recite that a full and complete statement, duly approved, showing the amount of outstanding bonds and interest thereon, together with the delinquent assessments and penalties and likewise showing the property liable for assessment to pay the same and the extent to which each such piece of property is

so liable is on file in the office of the city or town clerk. The assessment levied under authority of this Act against any lot or piece or parcel of land shall not exceed the proportionate part of the Street Improvement Refunding Bonds for which that lot or piece or parcel of land is liable before the passage of this Act. Said resolution shall also recite that any person, firm or corporation interested or liable shall have the right to file a written protest against the amount shown by the statement in the office of the city or town clerk to be due against any piece of property in which such protestant is interested: provided said protest be filed within fifteen days from the date of the first publication of said resolution, and that failure to file said protest within the time stated shall be deemed to be a waiver of any right such person, firm or corporation may have had or claimed that might have been made the basis of a protest. Said resolution shall be published in a newspaper printed in the county and having a general circulation in the city or town and must be published in two successive issues of weekly newspapers or in two successive Thursday issues of a daily newspaper.

Section 5. Same—Protests.

After the time for filing protests has passed, the governing board shall cause the city or town clerk to mail a written notice to all persons, firms or corporations who have filed written protests, and to all bond holders of bonds against the special assessment district who have filed 'Agreements to Accept Street Improvement Refunding Bonds' advising as to the date, time and place, when and where the governing board of said city or town will hear protestant's objections orally. If at said hearings it is established that the statements of the amount of bonds outstanding, the property liable for assessments against the same are in error, the governing board shall correct the same accordingly.

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Section 6. Ordinance—Reassessment—Method of Payment—Lien of Assessment—Priority.

After the governing board of any city or town has heard all protests and the amount of assessments and penalties due from each piece of property in the special assessment district has been definitely determined and confirmed said board shall scale down the total special assessment obligation for which each lot, piece or parcel of real estate was liable before refunding so as to determine the amount for which each such piece of property should be reassessed in order to raise its proportionate part of the revenue necessary to retire an amount of 'Street Improvement Refunding Bonds' equal to the total amount represented by the 'Agreements to Accept Street Improvement Refunding Bonds' that have been filed, plus accrued interest, said governing board shall then enact an ordinance describing each piece of property in the special assessment district liable for special assessments and state the total amount of assessments and penalties for which each piece so described is liable as reapportioned and said ordinance shall also declare that the amounts set opposite each such description are thereby reassessed against said properties and that said ordinance shall constitute the levying authority whereby said amounts named shall be payable in ten equal annual installments and shall bear interest at the rate of Seven (7%) per cent per annum until paid. Said ordinance shall also recite that unless said amounts are paid within thirty (30) days from the date of publication of said ordinance, said levies shall thereafter be payable only in accordance with the provisions of this Act and that the owners of the property so named shall have the privilege of paying all of the amounts set opposite the description of their property without interest, within thirty (30) days from the date of the publication of said ordinance and thereby relieve said property of any lien or obligation arising out of the improvements constituting the basis of said assessments. Said ordinance shall be published once in some newspaper printed in the County and having a general

circulation in said city or town. Such special assessments and each installment thereof and the interest thereon are hereby declared to be a lien against the lots or tracts so assessed from the date of the publication of said ordinance and said lien shall be co-equal with the lien of other taxes and shall be prior and superior to all other liens against such lots or tracts and such lien shall continue as to unpaid installments and interest until such assessments and interest thereon shall be fully paid, but unmatured installments shall not be deemed to be within the terms of any general covenant of warranty.

Section 7. Record of Reassessment.

As soon as the assessing ordinance is adopted, the city or town clerk shall prepare a book which shall be known as the 'Assessment Record of Street Improvement Refunding Bonds' in which he shall enter a description of each lot, tract or sub-division or real estate to be assessed in accordance with the provisions of said ordinance, setting out the amount of each assessment and leaving a space for entering the name of the owner of each such lot, tract or sub-division and a blank space for entering the payments which may be made from time to time on account of such assessment.

Section 8. Installments—Due Date—Delinquencies —Penalty.

The first installment of said assessments, together with interest upon the whole thereof from the date of the passage of the assessing ordinance to the first of the next following September, shall be due and payable on or before the first day of September next succeeding the passage of the ordinance; provided, however, if such assessing ordinance is not passed prior to the first day of August in any year, the first installment of such assessment shall be due and payable with interest from the date of the passage of such assessing ordinance to the first day of September of the following year. In

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case any installment or interest is not paid when due, the installment so matured and unpaid and the unpaid interest thereon shall draw interest at the rate of twelve per cent (12%) per annum from maturity until paid, except as hereinafter otherwise provided. All assessments and interest shall be paid to the city or town clerk, who shall deliver same to the city or town treasurer who shall keep the same in a separate special fund for the purpose of paying the bonds and interest coupons thereon issued against such assessments, and after the payment of all bonds that have been issued against the special assessment district, and the interest thereon, and any surplus remaining in said fund shall be paid into the general revenues of said city or town.

Section 9. Bonds.

Immediately after the expiration of thirty (30) days from the publication of the assessing ordinance, within which period the whole of any assessment must be paid without interest, the governing body of such city or town shall provide by resolution for the issuance of negotiable coupon bonds in the aggregate amount of such assessments then remaining unpaid, bearing date of thirty (30) days after the publication of the ordinance levying the assessments and in denominations of one hundred ($100.00) dollars or as said governing body finds to be convenient in effectuating an exchange with the holders of the bonds being refunded, which bonds shall in no event be or become a liability of the city or town issuing the same. The bonds herein provided for shall recite that they are negotiable under the laws of Oklahoma and that they are payable at the expiration of eleven (11) years from their date, subject to partial pro rata payments on the principal with proportionate reduction of interest coupons in accordance with any such payments; and that in addition to other recitals each coupon shall provide that it is subject to reduction in accordance with any payments made on the prinicpal of the bond to which it is attached.

Said bonds shall be made to bear interest at the rate of six (6%) per cent per annum from their date until paid, payable on the first day of September of each year, beginning on the second September following the date of said bonds. Said bonds shall be designated 'Street Improvement Refunding Bonds' and shall recite that they are issued in pursuance of this Act for the purpose of refunding outstanding bonds against the special assessment district described therein by naming the street or streets, or parts thereof, or other public place, with respect to which the original bonds were issued, and that they are payable from the reassessments which have been levied upon the lots, tracts or sub-divisions of land benefited by said improvement and from the accumulation of the interest and penalty provided by law; said bonds shall further recite the number of the ordinance and date of its passage by which re-assessments therefor have been levied; said bonds shall further recite that they may be used in the payment of any special assessment installment against which they are issued for the interest or penalties accumulated thereon and that the matured interest coupons attached thereto may be used likewise, but that in no event shall said bonds or coupons be credited against any such special assessment installment or the interest or penalty accumulated thereon, except at par value; each of said bonds shall further recite that it is a part of an issue aggregating (state the amount) the total special improvement obligation of the district against which it is issued and that no bond of said issue shall enjoy priority of payment over any other bond of said issue, notwithstanding the numerical designation of any bond. Said bond shall be signed by the mayor of said city or the president of the board of trustees of such town and shall be attested by the city or town clerk, and shall have the impression of the corporate seal of the city or town thereon, and shall have interest coupons attached thereto, maturing in accordance with the tenor of said bonds, bearing facsimile signatures of the mayor and city clerk or president of the board of

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trustees and town clerk, as the case may be; said bonds and interest coupons shall recite that they are payable at the office of the city or town treasurer. Said bonds shall be numbered consecutively beginning with number one (1), but said numerical designation shall not constitute any priority as to payment of any bond over the other. Each such bond shall be registered by the clerk and treasurer of such city or town in books to be provided for that purpose and each such bond shall bear an endorsement executed by the clerk and treasurer of such city or town certifying that said bonds have been so registered. Neither said bonds nor coupons shall be so issued as to be subject to call or redemption in cash before the date of maturity stated thereon.

Section 10. Bonds Accepted in Payment of Installments.

Any of said Street Improvement Refunding Bonds and matured coupons may be used the same as cash in the payment of any or all matured or unmatured installments of special assessments or any part of any such installment, levied against any property within the special assessment district for which said bonds and coupons are issued, or in payment of any interest or penalty that has accrued upon any such installment, and when so used it shall be the duty of the city or town clerk accepting such payment to credit the lot, tract or parcel of land for which such payment is made, with credit equal to the face amount of bonds and matured coupons tendered to him, charging off the oldest special assessment obligations and interest accrued, provided, however, it shall be unlawful for any city or town clerk or treasurer in accepting any such bond or matured coupon, to credit only a part thereof on any assessment obligation and return any cash, voucher or warrant to the person, firm or corporation tendering the same, and provided further that no such bond shall be accepted as cash in payment of a special assessment obligation unless all of the unmatured coupons are attached thereto. Any bond or matured coupon so ten-

dered must be entirely credited against some outstanding assessment obligation or otherwise they may not be used at all for that purpose, but no credit shall be given for the unmatured coupon attached to any such bond. Whenever any such Street Improvement Refunding Bond or Coupon shall have been paid by the city or town treasurer, or shall have been received in connection with the payment of any outstanding special assessment obligation as provided for in this Section, whether matured or not, it shall be the duty of the city or town treasurer receiving the same to mark each such bond or coupon 'Paid' in red ink or with a punch bearing said word, and thereafter to keep the same in a place of safekeeping.

Section 11. Exchange of Bonds.

All cash payments made within said period of thirty (30) days following the date of the publication of the ordinance levying such assessments, shall be paid to the city or town treasurer who shall place the same in a separate special fund. Such Street Improvement Refunding Bonds in such amount as shall represent the unpaid assessments as provided for in this Act, shall be delivered to the holder or holders of such original bond or bonds and accrued interest and coupons in exchange for such original bond or bonds and accrued interest and coupons at a rate of par for par and if, due to payments made during the thirty (30) days period herein mentioned, there are fewer Special Assessment Refunding Bonds issued than are necessary to effectuate a par for par exchange, the difference shall be adjusted out of the cash receipts placed in said special fund during said thirty (30) day period. In event any such cash adjustments are necessary, each holder of the obligations being refunded shall participate proratably in the available cash. All of the original bonds and coupons so received in said exchange shall be cancelled and a record of such cancellation so made upon the bond register of such city or town.

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Section 12. City Clerk—Duties—Payment of Matured Interest and Coupons.

The assessments provided for and levied under the provisions of this Act shall be payable as the several installments become due, together with interest thereon, to the city clerk of such city or town, who shall give proper receipt for such payments, and credit the same upon the 'Assessment Record of Street Improvement Refunding Bonds.' It shall be the duty of the city or town clerk to keep an accurate account of all such collections made by him, and to pay to the city or town treasurer daily the amounts of such assessments collected by him in cash, and the amounts so collected and *paity* to the city or town treasurer shall constitute a separate, special fund to be used and applied to the payment of such bonds and the interest thereon as follows: such fund shall first be used to the payment of the matured interest coupons due on such bonds and after the payment thereof the balance in such special fund to be applied on the principal of the outstanding bonds; provided that no prepayment on the principal of such bonds shall be made unless there is on hand in such fund after the payment of matured interest coupons, a sum equal to or greater than ten per cent of the principal of said outstanding bonds; and provided further that the remaining interest coupons on said bonds, shall be reduced in proportion to the amount of such payments. Such bonds and coupons as are received by the city or town clerk in payment of such special assessment obligations shall be delivered daily to the treasurer of said bonds or coupons by said treasurer, and at the time the same are by said treasurer marked 'Paid' as in this Act provided, said treasurer shall cause his bond register to recite the date and manner by which said bonds or coupons were retired.

Section 13. Foreclosure of Refunding Bond.

If any installment of reassessment levied under the provisions of this Act providing for the payment of said Street Improvement Refunding Bonds shall have

been delinquent for a period of at least twelve (12) months, the holder of any bond issued under the provisions of this Act, retirement of which cannot be had by reason of insufficient money being on hand in the special fund provided for the retirement thereon, shall have the right to institute in the name of the city or town, issuing such bond, an action in the District Court of the County in which said property is located to foreclose the lien of such reassessment, stating in said petition generally the ownership of such bond or coupon, the facts concerning the delinquency in payment of the same, describing the property assessed, the nature of the improvement, the amount of the unpaid delinquent reassessment and interest and penalty due thereon and praying for the foreclosure of such lien. Upon the filing of such suit all unmatured installments of assessments shall become due and payable and the lien of such assessments foreclosed in such action. Summons shall be issued on such petition as in other civil actions and the cause tried by said District Court. Judgment may be entered thereon for the amount of all reassessments levied, both matured and unmatured, together with interest and penalty due on such installments as have become delinquent and said judgment shall bear interest at the rate of six (6%) percent per annum from the time of the institution of such action until said judgment is paid. In event said judgment, together with interest and costs is not paid within thirty (30) days after the date of rendition thereof, an order of sale shall issue by the clerk of said court, directed to the sheriff of the county, to sell said real estate in the manner and form provided for the sale of real estate without appraisement. Such judgment shall carry the cost of such action together with the cost of such sale; and upon the payment of such judgment, the amount received shall be paid to the clerk of said court who shall pay over all of the money received except that part representing the costs of said case to the city or town treasurer who shall then credit the same to the separate special fund provided for the payment of

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such outstanding Street Improvement Refunding Bonds and interest thereon. Such judgment shall not be paid except in lawful money of the United States of America, but nothing herein shall be construed to prevent the dismissal of such foreclosure action at any time prior to judgment upon payment of the total delinquent re-assessments, interest and penalty for which the property sought to be foreclosed is liable, in bonds or coupons as provided in this Act, and the payment of the costs accrued in said Action to the date of such dismissal. The judgment mentioned herein shall provide for the sale of said real estate subject to existing general and ad valorem taxes and subject to any special assessments not foreclosed in said Action. All owners or encumbrances shall be made parties defendant in such suit.

Section 14. Validity of Re-assessment—Injunction.

No suit shall be sustained to set aside any assessment as to injoin the governing body of any city or town from levying or collecting any such assessment, or installment thereof or interest or penalty thereon, or issuing the bonds or providing for their payment or contesting the validity therof on any ground, or for any reason, other than for the failure of such governing body to adopt and publish the resolutions and ordinances provided for in this Act, unless such suit shall be commenced within fifteen (15) days after the publication of the ordinance levying the reassessments; and provided, however, that in the event any special re-assessment shall be found to be invalid or insufficient in whole or in part, for any reason whatever, the governing body may at any time in the manner provided for in this Act, proceed to cause a new and corrective assessment to be made and levied which shall have the same force and effect as if the same had been properly made in the beginning.

Section 15. Construction of Act.

This Act shall not be construed to validate any void assessment hertofore made or any improvement bonds heretofore issued; nor shall any proceedings hereunder operate to make binding upon any property owner any previous invalid obligation but every defense available against the original assessment shall be preserved to and be available against any issue or refunding bonds issued hereunder.

Section 16. Same.

It is hereby declared to be the intention of the Legislature, in the enactment of this Act, that it be construed in its entirety; and that if any part thereof is unconstitutional and void, the entire Act shall be void.

Approved May 12, 1939. Emergency."

This Act is set out in Title 11, Oklahoma Statutes Annotated, as Sections 242 to 242-o, inclusive.

(C) Date of Judgment on Appeal

The judgment sought to be reviewed is a judgment delivered by the Supreme Court of Oklahoma in its case number 32427, entitled "Vernon Baccus, County Treasurer of Washita County, Oklahoma, and A. F. Reeder, Intervenor, Plaintiffs in Error, vs. W. F. Banks, Defendant in Error", filed and entered on October 28, 1947. Thereafter, and within fifteen (15) days, as authorized by Rule 28 of the Supreme Court of the State of Oklahoma, a petition for rehearing was filed. Thereafter, on the 5th day of December, 1947, with leave of Court, supplemental petition for rehearing was filed. On the 6th day of January, 1948, petition for rehearing was denied, and on the 22nd day of January, 1948, by *nunc pro tunc* order, the order denying petition for rehearing, on the 6th day of January, 1948, was also made applicable to supplemental petition for rehearing.

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The application for appeal is presented herewith on the 30 day of Jan., 1948.

(D) Nature of the Case

This presents a situation wherein special assessment bonds issued in 1929, and the assessments pledged to the payment of said bonds were cancelled and extinguished by an Act of the Oklahoma Legislature in 1939, same being Senate Bill No. 164, set forth as Sections 242 to 242-o, Oklahoma Statutes Annotated 1941 (hereinafter referred to as O. S. A.).

The question is whether or not said act, and particularly Section 242, which purports to extinguish said bonds and said liens, and which extinguishes all remedies and methods of collection after the period prescribed in said Act is an impairment of the obligation of contract of appellant bondholder in violation of Article 1, Section 10, of the Constitution of the United States, and a taking of his property without due process in violation of the Fourteenth Amendment to the Constitution of the United States.

The action was commenced October 29, 1945, by filing in the District Court of Washita County, Oklahoma, a petition for injunction by W. F. Banks, a property owner, against Vernon Baccus, County Treasurer of Washita County, Oklahoma, to enjoin the county treasurer from selling plaintiff's property for the special assessments securing appellant's bonds at the forthcoming November, 1945 tax sale.

Plaintiff alleged that, during the year 1929, paving District No. 8 was created; that bonds,[1] a copy of one of which is attached hereto as Exhibit A, were issued dated March 16, 1929, payable solely from said special assessments; that

[1] All of said bonds are identical except for number, except Bond No. 1, which is in an odd amount.

the last of "said paving bonds, assessments, installments, interest and penalties, according to the face thereof, became and were past due and delinquent on March 17, 1939." Plaintiff alleged that "in 1939 the Legislature of the State of Oklahoma passed a law, being O. S. 1941, Title 11, Sec. 242, which reads, in part as follows:

> 'From and after the effective date of this act, the right of any holder to enforce the lien of any street improvement bond issued under authority of Chapter 10, Article 12, Oklahoma Revised Laws of 1910, or of any street improvement bond or refunding street improvement bond issued under any authority contained in Chapter 33, Article 14, Oklahoma Statutes of 1931, and statutes supplementary and amendatory thereto, by foreclosure, mandamus, refunding or otherwise, shall be barred upon the expiration of 3 years immediately following the maturity date named in the face of such bond, unless the holder of any such bond shall have commenced suit to foreclose his lien by filing an action for that purpose and procuring service of summons therein or shall have evidenced his willingness to accept street improvement refunding bonds issued under the provisions of this act, in exchange therefor, prior to the expiration of said 3 year period of limitation; . . . The running of the period of limitation herein fixed shall be an absolute bar to any action or proceeding brought thereafter whether the same is plead as a defense or not, and the property against which such bonds theretofore represented a lien shall thereafter be, by operation of law, absolved of any lien or liability on account of said bond.' "

Plaintiff then alleged that the bondholders had not brought an action to foreclose nor evidenced their willingness to accept refunding bonds in exchange for said paving bonds, all as commanded in said Act; so that the bonds and the liens securing them no longer existed and were extinguished by said statute, by reason of which the county

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treasurer should be permanently enjoined from attempting to sell said property for said lien.

The county treasurer admitted the creation of the paving district, and that the liens were delinquent, and that he was about to sell the property for the purpose of satisfying said lien.

Thereafter, A. F. Reeder, appellant herein, intervened, asserting that he owned Bonds No. 34 to 39, inclusive, in said paving district, payable solely from special assessments levied in said district. An order permitting intervention was made.

Intervenor filed his answer asserting his ownership of the bonds, and admitting the delinquent assessments. Intervenor further admitted that "the Legislature of the State of Oklahoma in the year 1939 enacted the statute alleged and referred to in plaintiff's petition, but petitioner alleges that the street improvement bonds issued as above set forth by said City were issued pursuant to the 1923 paving law of the State of Oklahoma and that said law became a part of said bonds and that the said act of the Legislature of 1939 is unconstitutional and void insofar as Intervenor's bonds are concerned, for the reason that such act of said Legislature is and was an attempt to impair the obligation of the contract; that said 1923 paving law provided, among other things, that the assessments made should and would become a lien against said property until the same was paid" (Casemade page 16-17).

Thereafter, the plaintiff filed a demurrer to the answer of defendant and intervenor, asserting that neither of them stated a defense, and the Court entered its judgment sustaining the demurrer to the answer, and a permanent injunction was granted. The Court found in its judgment that "the sole and only question involved herein is the question of the constitutionality of the 1939 Act of the

Legislature of the State of Oklahoma, the same being Section 242, Title 11, O. S. 1941, and the Court further finds that said Act is constitutional and that said demurrer should in all things be sustained." A copy of said judgment is attached hereto as Exhibit B. The Court then decreed that the county treasurer be permanently enjoined from selling the real estate involved for delinquent special assessments.

Notice of appeal from that judgment was given by Vernon Baccus, County Treasurer, and by the appellant, A. F. Reeder, who was intervenor below. In appellant's petition in error to the Supreme Court of the State of Oklahoma, he alleged, complaining of the Honorable Trial Court:

> "1. Said Court erred in sustaining the demurrer of plaintiff to the answer of the said Vernon Baccus, County Treasurer of Washita County, Oklahoma.
>
> "2. Said Court erred in rendering judgment for plaintiff and granting the permanent injunction therein issued.
>
> "3. Said Court erred in ruling that the Act of the Legislature of the State of Oklahoma passed in 1939, the same being Section 242, Title 11, O. S. 1941, is constitutional."

On page 17 of the brief of plaintiffs in error (appellant here), in Case No. 32427, in the Supreme Court of the State of Oklahoma, the following appears:

> "PROPOSITION I [2]
>
> Senate Bill 164, O. S. 1939, Sections 242 to 242-o inclusive, Title 11, O. S. A., is unconstitutional and void and therefore the judgment of the court is contrary to law."

---

[2] This was the sole proposition presented.

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And, on page 21 of said brief, it is further stated:

> "The 1923 Paving Law provided that the lien should be 'co-equal with the lien of other taxes' and that such lien shall continue 'until such assessments and interest thereon shall be fully paid ' ".

And, on page 23 of the brief, it is further stated:

> "The 1939 Act, among other things, attempted to absolve the property in the paving district from the lien of the assessment. If this lien was a perpetual lien as provided by the Statute and as held by this Court, then certainly the attempt of the 1939 Legislature to absolve the property of the lien is an impairment of the obligation of the contract and is unconstitutional and void."

In the aforementioned judgment of the Supreme Court of the State of Oklahoma, the judgment of the trial court in sustaining the demurrer and granting a permanent injunction was affirmed; and the Supreme Court concluded by holding that the Act violated neither the due process and equal protection clause, nor the contract clause of the State and Federal Constitutions.

The Court held that the Act not only barred judicial proceedings, to-wit: foreclosure proceedings by the bondholders, but also barred tax sale proceedings by the county treasurer, which was the method enjoined by the Court in this case, although this method of collection was exercisable only by the county treasurer for the benefit of the bondholders. The Court held this tax sale to be a "remedy" which had been extinguished by the 1939 Act. The court also held that the bondholder could not compel the performance of this "remedy" by the county treasurer by mandamus.

The Court held that the extinguishment of the method of collection by the county treasurer was not an impairment

of the obligation of contract but was merely a statute of limitations and was valid as to pre-existing rights, the Court finding that the period of limitation was not unreasonable.

The findings of the Supreme Court of the State of Oklahoma regarding operation of said statute in question, and the grounds of its said judgment and decree are contained in the copy of the judgment of said Court, marked Exhibit C, hereto attached and made a part hereof.

An analysis of the rights given to the bondholders under the laws under which the bonds were issued and an analysis of the 1939 Act, which extinguished those rights, is set forth in Exhibit D, attached hereto and made a part hereof.

The Supreme Court of the State of Oklahoma is the highest court of said State in which a decision of this suit can be had and its judgment is final.

We respectfully submit that this case presents a clear instance of a controversy where is drawn in question the validity of a statute of a State on the ground of its being repugnant to the Constitution of the United States, and that this appeal is squarely within Section 237 (a) of the Judicial Code (28 U. S. C. A. 344). See *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239, 42 Sup. Ct. Rep. 106; *Jett Bros. Distilling Co.* v. *Carrollton*, 252 U. S. 1, 64 L. Ed. 421; *Western Turf Association* v. *Greenberg*, 204 U. S. 359, 27 Sup. Ct. Rep. 384, 51 L. Ed. 520; *Memphis Nat. Gas Co.* v. *Beiler*, 62 Sup. Ct. 857, 315 U. S. 649, 86 L. Ed. 1090; *Charleston Fed. Savings & Loan* v. *Alderson*, 65 Sup. Ct. 624, 324 U. S. 182, 89 L. Ed. 857.

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(E) Substantiality of the Federal Question

We respectfully submit that there can be no doubt as to the substantiality of the Federal Question.

The plaintiff in the court below relied solely on the 1939 Act for the extinguishment of the special assessment liens, which were the sole source of payment of appellant's bonds. The question raised in and decided by the Supreme Court of the State of Oklahoma was whether or not the 1939 Act, which clearly extinguished these liens, was an impairment of the obligation of contract as set forth in appellant's bonds, and in the laws in existence at the time said bonds were issued and which became a part of said obligation.

There is no question but that appellant's bonds, which were issued by the City of Cordell, Oklahoma, to pay for the improvements described on the face of the bond, constitute a contract, nor is there any question but that the laws existing at the time of the issuance of said bonds, providing for the creation of liens for the payment of said bonds, the quality, attributes and duration of said liens, and the provisions for the enforcement thereof, entered into and became a part of said contract. See *Nelson* v. *Pitts*, 126 Okla. 191, 259 Pac. 533; *Straughan* v. *Berry*, 179 Okla. 364, 65 P. (2d) 1203; *Davis* v. *McCasland*, 182 Okla. 49, 75 P. (2d) 1118; *Hann* v. *City of Clinton*, 131 F. (2d) 978; *Moore* v. *Otis*, 275 Fed. 747; *Von Hoffman* v. *Quincy*, 4 Wall. 535, 18 L. Ed. 403; *Worthen Co.* v. *Kavanaugh*, 79 L. Ed. 638, 55 Sup. Ct. 555, 97 A. L. R. 905; *Louisiana, ex rel. Hubert* v. *New Orleans*, 215 U. S. 170, 54 L. Ed. 144, 30 Sup. Ct. 40.

There is further no question but that the lien remained except for the operation of the 1939 Act. We quote from Page 13 of the Court's opinion:

> "At the time of the enactment of the 1939 Act, there was no statute of limitations applicable to the sale and

> resale by the county treasurer of property to satisfy street improvement liens. . . ."

To the same effect is *City of Healdton, ex rel. Rewoldt* v. *Pickens,* decided January 6, 1948, where the Court said:

> "It is affirmatively declared by statute that the lien on real estate for delinquent ad valorem taxes does not expire by lapse of time. Such lien continues until the taxes are paid or until the real estate is sold by the county treasurer for the delinquent taxes. By section 103, supra, the lien for paving assessments is given the same quality as a lien for ad valorem tax and such lien may be discharged in like manner as a lien for ad valorem tax. Settle *v.* Frakes et al., 156 Okla. 53, 9 P. 2d 768. It was also held in Settle *v.* Frakes, et al., that the failure of the county treasurer to offer for sale and sell real estate for delinquent paving assessments does not discharge the lien."

The 1939 Act, and only the 1939 Act was relied on to extinguish the assessments and the bonds involved herein. The 1939 Act simply provided that the bonds and the liens securing the bonds were extinguished three years after the maturity of the bonds and, of course, if the lien was extinguished the county treasurer would be without authority to sell the property.

The Court further held that this method of collection by the county treasurer was a remedy and that, under well-considered principles, remedies could be taken away by so-called statutes of limitation even though there was no prior limitation, and that said limitation could extinguish not only the remedy but the right.

The principal case relied on by the Court was *Wheeler* v. *Jackson,* 137 U. S. 662, which we believe inappropriate to the facts in this case.

An analysis of the *Wheeler* case discloses that, under the charter of the City of Brooklyn, from which Wheeler pro-

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cured his tax certificate, the tax collector sold the property on which the tax was imposed "for the lowest number of years for which any person will take the same and pay the amount of such tax with interest and expenses," the purchaser to receive a certificate of sale. This certificate was a lien upon the lands, and the owner of the land was given the right to redeem at any time within two years by paying the purchase money plus 15%. If not paid within two years, the tax sale certificate holder could demand a conveyance of the premises for the term of years he had purchased and thereupon the collector was required to execute a conveyance to him. Apparently there was no time prescribed within which he could request the execution of the conveyance, although there probably was some limitation for the institution of a suit to compel it, as the Court in the *Wheeler* case states that:

> "It is not disputed that there was a limitation under the local law for suits of that character."

Thus, after the period of redemption, the purchaser instead of asking for a conveyance of the premises for the term of years named in the certificate, would do nothing. The owner was helpless because his period of redemption had expired. The lien of the purchaser continued until he got a conveyance, and if the owner wanted to redeem the land, the purchaser would require him to pay the taxes with interest at 15% to date. If the purchaser had procured his certificate and the owner had then sought to regain the land by invalidating the proceedings, the 15% interest would have stopped so that it was to the purchaser's advantage to remain inactive.

The Legislature in 1885 simply required the purchaser to exercise a right which he had failed to exercise for over eight years, within six months and provided that upon

failure to do that, the registrar was to cancel all such sales and the lien was thereby extinguished.

The basic distinctions between the *Wheeler* case and that now before this Court are as follows:

(a) In the *Wheeler* case, the New York Legislature did not seek to put a limitation on the right of the Registrar of Arrears to sell the property for taxes as was done here under the 1939 Act.

(b) It was reasonable to compel the certificate holder to perfect a right which he had acquired under the New York Act, because the execution of this right was within his power and control; whereas, here the right to sell this property at tax sale was controlled only by the county treasurer.

(c) It was reasonable to withdraw the right from the New York certificate holder for his failure to assert his right, but it is not reasonable to withdraw the rights given us to have our lien sold by the county treasurer, for his dereliction of duty.

(d) The tax sale proceeding here is not a remedy possessed by the bondholders that may be withdrawn on reasonable notice, but a power in trust possessed by the county treasurer.

(e) Here, unlike the situation in the New York case, the three (3) year period (or the eighteen (18) month and nineteen (19) day period) given to the bondholders under the 1939 Act was meaningless, because the bondholders had no power or authority to avoid the extinguishment of their right by taking any action to satisfy their lien.[3]

---

[3] In addition to the foregoing distinctions, the 1939 Act imposed a new condition and placed a new responsibility on the bondholders, by holding that the bondholders could have avoided the statute by commencing a mandamus suit, the Court in effect held that it was the bondholders' duty to compel the county treasurer to perform his statutory duty.

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Nor are we precluded by *United States* v. *Morena*, 245 U. S. 392, and *Terry* v. *Anderson*, 95 U. S. 365. (Page 14 of Supreme Court's opinion); nor by *Curtis* v. *Whitney*, 80 U. S. 513 (Page 17 of Supreme Court's opinion).

In the *Morena* case, an Act of Congress limited the time in which aliens who had declared their intention of becoming citizens should petition for citizenship though there was no limitation of time when the declaration was made. Inasmuch as Article 1, Section 10, is a limitation upon the rights of States and not of the Federal Government, this case has no application. In addition, Morena could have avoided the penalty imposed by the Act by filing his petition; whereas, the Oklahoma bondholder could not avoid the extinction of his lien by instituting proceedings for the sale of the property for these delinquent assessments, this power being vested solely in the County treasurer for his benefit.

In the *Whitney* case, the Wisconsin Legislature provided that, where land has been sold for taxes and a deed applied for by the purchaser of the certificate, the deed should not be issued until a written notice should have been served on the owner or occupants. The prior law had not required such notice. The question was whether or not the new statutory requirement impaired the obligation of the contract of a certificate holder who purchased a certificate prior to the new Act. The Court rightly held that the notice required did not lessen the binding efficacy of plaintiff's contract.

In *Terry* v. *Anderson, supra,* the Georgia Legislature imposed a statute of limitations on the right to sue stockholders of insolvent banks, and limited the creditors' time to institute an action to nine (9) months. Again this is a conventional case where the recourse to the courts may be taken at any time by the person against whose rights the

law operates, and who has complete dominion and control over the cause of action thus barred.

The case at bar is governed, not by the principles announced in the *Wheeler* case, but by those announced in the following cases:

Von Hoffman v. *Quincy*, 4 Wall. 535, 18 L. Ed. 403;
Seibert v. *Lewis*, 122 U. S. 284, 30 L. Ed. 1161;
U. S. ex rel. Wolff v. *City of New Orleans*, 103 U. S. 358, 26 L. Ed. 395;
Louisiana ex rel. Hubert v. *New Orleans*, 215 U. S. 170, 54 L. Ed. 144, 30 Sup. Ct. 40;
County Court of Ralls County v. *U. S. ex rel. Douglas*, 26 L. Ed. 1220;
Louisiana ex rel. Nelson v. *Police Jury*, 28 L. Ed. 574;
Rees v. *Watertown*, 19 Wall. 107, 22 L. Ed. 72;
Worthen Company, Trustee, v. *Kavanaugh*, 79 L. Ed. 638, 55 Sup. Ct. 555, 97 A. L. R. 905.

We believe that an impairment of a contract is no less an impairment because it is to take effect in the future rather than at the present, and that this act impairs the obligation of contract under the guise of imposing a statute of limitations.

In addition to the cases heretofore cited, with which this case is clearly in conflict, same is in direct conflict with the United States Circuit Court of Appeals, Tenth Circuit, in the case of *Hann* v. *City of Clinton*, 131 F. (2d) 978. Therein, the Court held:

> "These bonds were issued and outstanding when that statute was enacted. They were issued under the provisions of Chapter 173, Laws of 1923, supra, in which it is provided that the lien shall continue until the assessment and interest thereon shall be paid in full. That provision became a part of the contract and it requires no amplification beyond that which has been

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said to make it plain that to give effect to the act of 1939 in absolving the property of the lien short of payment or sale of the property for delinquent installments or other delinquent taxes would impair the obligation of contract."

The sole reference to the *Hann* case, made by the Supreme Court of the State of Oklahoma, is:

> "The court in Hann *v.* City of Clinton, 131 Fed. 2d 978, cited no authority in support of its holding that the 1939 act is unconstitutional, and apparently gave no consideration to the above cited authorities, probably because its attention was not called to them."

The 1939 Act has been held unconstitutional, following *Hann* v. *City of Clinton, supra,* in dozens of cases by the Federal District Courts in and for the Western, Northern and Eastern Districts of Oklahoma. Neither these courts nor the Circuit Court of Appeals hesitated to declare this act a clear impairment of the obligation of contract.

Furthermore, it should be pointed out that the opinion of the Supreme Court of the State of Oklahoma in this case was not unanimous. We believe that a clear statement of the law as it should have been announced by this Court is contained in the ten concluding paragraphs of Justice Gibson's well-reasoned opinion, handed down on the same day as the majority opinion. A copy of this opinion is attached hereto as Exhibit E.

The precedent established by the judgment of the Supreme Court of the State of Oklahoma is of the utmost importance to municipalities as well as to bondholders. This holding will not only wipe out millions of dollars of delinquent paving bonds, but will jeopardize all paving bonds issued after the 1939 Act, and will make it exceedingly difficult for cities and towns in Oklahoma to market their street improvement bonds.

WHEREFORE, we respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal.

LOCKWOOD JONES,
ARNOLD T. FLEIG,
W. R. BANKER,
SOLON W. SMITH,
Attorneys for Appellant.

(Here follows Exhibit "A"

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EXHIBIT -"A"

UNITED STATES OF AMERICA

STATE OF OKLAHOMA

COUNTY OF WASHITA

City of New Cordell

STREET IMPROVEMENT

NUMBER

BOND

DOLLARS

$500.00

SERIES No. 8

KNOW ALL MEN BY THESE PRESENTS: That the City of New Cordell, in the County of Washita, in the State of Oklahoma, for value received, hereby acknowledges itself indebted to and promises to pay the bearer hereof the sum of

FIVE HUNDRED ($500.00) DOLLARS

on or before October 1st, 1938, with interest thereon, from the date hereof, at the rate of six (6) per cent per annum, payable October 1st, 1929, and semi-annually thereafter on the First days of April and October of each year until maturity or date same is called for payment as provided by law, as evidenced by and upon the surrender of the annexed interest coupons as they severally become due, and after due, interest at the rate of ten (10) per cent per annum until paid, and both principal and interest are payable in lawful money of the United States of America, at the Fiscal Agency of the State of Oklahoma, in the City of New York, State of New York.

This bond and the other bonds of this series shall be called for payment in numerical order whenever the City Treasurer has funds obtained from the collection of the assessments levied to pay the cost of the work described in this bond sufficient to pay interest due and to become due within the next six (6) months on this series of bonds and the principal amount of one or more of said bonds, in manner and form prescribed by law pursuant to which same are issued

The series of bonds of which this is one, is of the aggregate amount of $34,043.06, and is issued in full compliance with the provisions of Chapter 173, of the Acts of the Ninth Legislature of the State of Oklahoma, approved March 23, 1923, and pursuant to a resolution duly adopted by said City, as required by law for the purpose of paying the cost and expense of improving Street Improvement District No. 8, same being:

FIRST STREET from the East line of Temple Street to the West line of College Street and from the East line of Walnut Street to the East line of Church Street. CHURCH STREET from the North line of Main Street to the South line of Fifth Street. FIFTH STREET from the West line of College Street to the East line of Temple Street. COPDELL STREET from the North line of Main Street to the North line of Cemetery Street. THE ALLEY IN BLOCK 45 from the North line of Main Street to the South line of First Street.

in the City of New Cordell, Washita County, Oklahoma, and is payable from assessments which have been legally levied upon the lots, pieces, and parcels of land benefited by said improvement, and from the accumulation of the interest and penalties arising from said assessments as provided by law, which assessments, interest and penalties said City undertakes to collect as by law provided, and the faith, credit, revenues and property of said City are hereby irrevocably pledged for the purpose of carrying out each and every stipulation contained in this bond.

And it is hereby declared and certified that all acts, conditions and things required to be done and to exist precedent to and in the making of said improvement and the levying of said assessments and the issuing of this series of bonds, have been properly done, happened and performed, and do exist in regular and due form, time and manner as required by the Constitution and Laws of the State of Oklahoma, and that the total amount of said assessments, and of the bonds issued on account of said improvement, including this bond, do not exceed any constitutional or statutory limitation.

IN WITNESS WHEREOF, the City of New Cordell, by its Mayor and City Council has caused this bond to be signed by its Mayor and attested by its City Clerk, and its corporate seal to be hereto affixed and the interest coupons hereto attached to be signed by the lithographed signatures of its Mayor and City Clerk, and this bond to be dated the 16th day of March, 1929.

(SEAL)
ATTEST:

CITY OF NEW CORDELL, OKLAHOMA

By.....
Mayor.

.....
City Clerk.

EXHIBIT "B"

IN THE DISTRICT COURT IN AND FOR WASHITA COUNTY, OKLAHOMA

No. 6976

W. F. Banks, *Plaintiff*,

vs.

Vernon Baccus, County Treasurer of Washita County, Oklahoma, *Defendant*

A. F. Reeder, *Intervenor*

Journal Entry of Judgment

Now, on this 2nd day of November, 1945, the above matter came on for hearing pursuant to assignment, the plaintiff appearing in person and by his attorney, A. J. Welch, and the defendant appearing in person and by Raymond T. Plumlee, County Attorney of Washita County, Oklahoma,

Whereupon, A. F. Reeder filed herein his application for permission to intervene, showing to the Court that he is the owner of paving bonds numbers 34 to 39 in Paving District No. 8 in the City of New Cordell and by reason thereof is vitally and materially interested in said cause, and the Court, after hearing said application, finds that said A. F. Reeder is entitled to intervene herein and it is Therefore Ordered that said party be permitted to intervene without prejudice to trial, and said intervenor appearing in person and by his attorneys, Jones & Wesner,

Whereupon, said intervenor filed herein his answer and thereafter the plaintiff filed his demurrer to the answers of both the defendant and the intervenor, and the court, after hearing the arguments of counsel finds: That the sole and only question involved herein is the question of the constitutionality of the 1939 Act of the Legislature of the State of Oklahoma, the same being Section 242, Title 11, O. S. 1941, and the Court further finds that said Act

is constitutional and that said demurrer should in all things be sustained.

It Is Therefore, Ordered, Adjudged and Decreed by the Court that the demurrer of the plaintiff herein to the answers of both the defendant and the intervenor, be, and the same is hereby sustained.

It Is Further, Ordered, Adjudged and Decreed by the Court that the defendant, Vernon Baccus, be and he is hereby permanently enjoined from selling, on November 5, 1945, at original tax sale, the real estate involved herein for delinquent special assessment taxes for the years advertised, and that permanent injunction be issued,

To Which Judgment the defendant and intervenor, and each of them, excepted and gave notice of their intention to appeal to the Supreme Court of the State of Oklahoma, and requested that the Clerk make notation of the same upon her docket, which said exception is by the Court allowed and said defendant and said intervenor be, and they are hereby granted sixty (60) days within which to make and serve casemade on appeal to the Supreme Court in said cause, the plaintiff to have ten (10) days after service of casemade to suggest amendments, the same to be signed and settled upon five (5) days' notice.

JNO. B. WILSON,
District Judge.

Endorsed: 6976.
Washita County, Okla.
Filed Nov. 15, 1945.
Ruth Hathaway, court clerk, by Lura Clevenger, Deputy.
Recorded 27-309.

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EXHIBIT "C"

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 32427

VERNON BACCUS, County Treasurer of Washita County, Oklahoma, and A. F. REEDER, Intervener, *Plaintiffs in Error,*

vs.

W. F. BANKS, *Defendant in Error*

Syllabus

1. Injunction will lie to prevent the sale of property to satisfy special assessment liens which have been extinguished.

2. The rule of ejusdem generia is resorted to merely as an aid in construction. If, upon consideration of the whole law upon the subject, and the purposes sought to be effected, it is apparent the Legislature intended the general words to go beyond the class specifically designated, the rule does not apply. Moreover, where the particular words exhaust the class, then the general words must be given a meaning beyond the class.

3. The provisions of 11 O. S. 1941 #242 are applicable to foreclosure of special assessment liens by tax sale and resale as well as by civil action.

4. The commencement of proceedings in mandamus to compel the proper officials to commence proceedings for sale and resale of property subject to special assessment liens within the period of limitations provided in 11 O. S. 1941 #242 would be sufficient to toll the running of the statute so that the sale and resale could be completed.

5. The existing limitation statutes do not ordinarily enter into and become a part of the obligation of contracts,

and the Legislature may shorten such period so long as a reasonable period remains.

6. Statutes of limitation may be made to apply to existing contract rights against which there were no such statutes in existence at the time they were erected, provided a reasonable time is allowed for their enforcement, and such statutes do not violate the constitutional provision against impairment of the obligation of contracts.

7. The period of time allowed in 11 O. S. 1941 #242 (18 months and 19 days) for the enforcement of existing contract obligations which had been due more than three years or which were to be due more than three years by November 1, 1939, was not unreasonable.

8. 11 O. S. 1941 #242 did not deprive owners of special assessment bonds of any of the remedies they previously had.

9. The Legislature may, in enacting a statute of limitations, make it effective to take away both the remedy and the right to make it applicable to existing contract rights, so long as the period of limitations is reasonable.

10. The provision of 11 O. S. 1941 #242, that the running of the period of limitation therein fixed "shall be an absolute bar to any action or proceeding brought thereafter, whether the same is plead as a defense or not, and the property against which such bonds theretofore represented a lien shall thereafter be, by operation of law, absolved of any lien or liability on account of said bonds," is but a part of, and is intended to make effective, the statute of limitations therein, and the same does not unconstitutionally impair the obligation of the contract, nor does it violate the due process clause or the equal protection clause of either the State or Federal Constitution.

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APPEAL FROM THE DISTRICT COURT OF WASHITA COUNTY, OKLAHOMA

HON. JNO. B. WILSON, *Judge*

AFFIRMED

Raymond T. Plumlee, County Attorney, Cordell, for plaintiffs in error.

Jones & Wesner, Cordell, for A. F. Reeder, Intervener.

A. J. Welch, Clinton, for defendant in error.

Holloway & Holloway, Oklahoma City,
Randall Pitman, City Attorney of Shawnee,
Walter H. Thomas, City Attorney of Woodward,
Forrest M. Divine, City Attorney of Hugo,
Charles W. Jennings, City Attorney of Lawton,
Norman E. Reynolds, W. Otis Ridings, Norman E. Reynolds, Jr, Oklahoma City,
James F. Haning, Wewoka,
Amici Curiae

HURST, C. J.:

In March, 1929, the City of Cordell created paving district No. 8, paved the streets in said district, levied special assessments, and issued bonds under the 1923 paving law, 11 O. S. 1941 ##81-117. The assessments and bonds became delinquent on March 17, 1939. The plaintiff, W. F. Banks, owned a lot in said paving district on which the assessment had not been paid. In October, 1945, Vernon Baccus, County Treasurer of Washita County, advertised the lot for sale at the November, 1945, delinquent tax sale to satisfy such special assessment. The amount of the special assessment and interest thereon then amounted to $672.62. On October 29, 1945, Banks commenced this action against the county treasurer to enjoin the sale of the same to satisfy the special assessment. A. F. Reeder, owner of bonds No. 34-39, inclusive, issued against said paving district, was allowed to intervene in the case.

In his petition, the plaintiff alleged that prior to the filing of this action, the lien for special assessments had ceased to exist by reason of the provisions of Section 1 of

Article 6 of Chapter 33, Page 156, Session Laws of 1939, 11 O. S. 1941 #242, in that the owners of the bonds issued against said paving district had commenced no suit to enforce this special assessment lien. The county treasurer filed an answer admitting that the plaintiff owned the lot in question, admitting the levy of the special assessment and the issuance of the bonds and the deliquency of the assessments and that the intention was to sell the lot for said special assessment at the November, 1945, delinquent tax sale, and alleging that the plaintiff had an adequate remedy in law. The intervener filed an answer alleging that 11 O. S. 1941 #242, in so far as it attempted to extinguish the special assessment lien, impaired the obligation of his contract and was unconstitutional, and he further alleged that the plaintiff had an adequate remedy at law for payment of the special assessment and suing as provided by 68 O. S. 1941 #15.50.

To the answers of the defendant and intervener, the plaintiff filed a demurrer which was sustained by the court and thereupon the court entered judgment granting plaintiff a permanent injunction enjoining the county treasurer from selling the lot for said special assessment. From that judgment, the defendant and intervener have perfected this appeal.

Section 242, on which the plaintiff relies, and which the intervener and amici curiae say is unconstitutional is as follows:

> "From and after the effective date of this Act, the right of any holder to enforce the lien of any 'Street Improvement Bond' issued under authority of Chapter 10, Article 12, Oklahoma Revised Laws of 1910, or of any 'Street Improvement Bond' or 'Refunding Street Improvement Bond' issued under any authority contained in Chapter 33, Article 14, Oklahoma Statutes of 1931, and statutes supplementary and amendatory thereto, by foreclosure, mandamus, refunding or otherwise, shall be barred upon the expiration of three years immediately following the maturity date named in the face of such bond, unless the holder of any such bond shall have commenced suit to foreclose his lien by filing

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an action for that purpose and procuring service of summons therein or shall have evidenced his willingness to accept Street Improvement Refunding Bonds issued under the provisions of this Act, in exchange therefor, prior to the expiration of said three year period of limitation; Provided, however, that in all cases where the period of limitation herein mentioned has expired or will expire prior to November 1, 1939, the holder of such bonds shall have until December 1, 1940, in which to pursue his remedy or obtain the benefits of this Act. The running of the period of limitation herein fixed shall be an absolute bar to any action or proceeding brought thereafter, whether the same is plead as a defense or not, and the property against which such bonds theretofore represented a lien shall thereafter be, by operation of law, absolved of any lien or liability on account of said bonds.

"It shall be the mandatory duty of the city clerk to notify the holders of all outstanding Street Improvement Bonds that the same are about to be barred by the Statute of Limitations, by mailing to the holder of each such bond at his last known address, as shown by the records of said city clerk, and by publication of notice in some newspaper of general circulation in the city or town in which such Street Improvement District is located, and if there be no newspaper published in said city or town, then the publication shall be made in some newspaper published in said county, and by publication thereof in at least one nationally recognized financial journal which notices shall be mailed and published at least sixty days prior to the expiration of such Statute of Limitations: said notices shall be substantially in the following form:

"Notice

To All Holders of Street Improvement Bonds of District No. — (or, if Appropriate, Insert the Ordinance or Serial No.) of the City of ——, Oklahoma:

You are hereby notified that on the — day of —, 19—, the above bonds and rights thereunder will be

barred by Statute of Limitation, as provided in Senate Bill 164, Oklahoma Session Laws, 1939. You will govern yourselves accordingly.

____ ____,

City Clerk of the City of —, Okla.

"Failure of the city clerk to give the notice provided herein shall not impair any of the provisions of this Act."

1. The county treasurer argues that injunction will not lie to restrain the sale, but that the only remedy of the property owner was to pay the assessment under protest and sue to recover the same as provided by 63 O. S. 1941 # 15.50. He argues that the decision in Payne *v.* Smith, 107 Okla. 165, 231 P. 469, holding that the prior statute, C. O. S. 1921 # 9971, which was substantially identical with #15.50, does not apply to special assessments, was overruled by Antrim Lbr. Co. *v.* Sneed, 175 Okla. 47, 52 P. 2d 1040. We do not agree. That case deals with the corporation license tax, and cites with approval Payne *v.* Smith, and points out that it stands for the rule that special assessments are not "taxes" within the purview of the prior statute. We think the rule stated in Payne *v.* Smith is still in effect, and injunction is the proper remedy to prevent the same of property to satisfy special assessments where the lien therefor has been eextinguished.

2. Amici Curiae argue that the 1939 act was intended to apply only to foreclosure actions, and was not intended to apply to foreclosure by the tax sale and resale method, the title refers to enforcement of the lien of street improvement bonds "by court action *or otherwise,*" and Section 1 fixes a limitation on enforcement of the lien "by foreclosure, mandamus, refunding *or otherwise.*" (Italics ours.) They contend that, under the doctrine of *ejusdem generis,* the general word "otherwise" is restricted by the particular words preceding it, and does not refer to tax sales and resales. They cite, among other authorities, Board of Commrs. *v.* Grimes, 75 Okla. 219, 182 P. 897; Worley *v.* Franch, 184 Okla. 116, 85 P. 2d 296; State *v.* Ellenstein,

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121 N. J. L. 304; 2 Atl. 2d 454; Post *v.* Land, 27 Col. App. 270 148 P. 377.

In Kansas City Southern Ry. Co. *v.* Wallace, 38 Okla. 233, 132 P. 908, in the third paragraph of the syllabus, the rule applicable here is stated thus:

> "The rule of *ejusdem generis* is resorted to merely as an aid in construction. If, upon consideration of the whole law upon the subject, and the purposes sought to be effected, it is apparent the Legislature intended the general words to go beyond the class specifically designated, the rule does not apply. Moreover, where the particular words exhaust the class, then the general words must be given a meaning beyond the class."

When we consider the conditions, that brought about the enactment of the law and the evils sought to be remedied, and the fact that the preceding words "action" and "foreclosure, mandamus, refunding" exhausted the remedies the bond holder could resort to, we are of the opinion that by the use of the word "otherwise" the Legislature intended to include the method of enforcement by tax sale and resale.

Furthermore, the 1939 act is expressly made applicable to liens created under the 1910 Revised Laws, and the only method of foreclosure under that law was by tax sale and resales. See Section 643.

3. Amici Curiae argue that, as to properties subject to special assessment liens, which had not been sold at an annual sale to satisfy such liens, the 18 months intervening between the effective date of the act and December 1, 1940, was not sufficient to complete the foreclosure under the tax sale and resale law, and that the bond holders were left no remedy where the remedy by action was barred, as held in City of Bristow *v.* Groom, 194 Okla. 384, 151 P. 2d 936. They argue that this renders the law unconstitutional. But, we are of the opinion that a mandamus proceeding instituted by the bond holder prior to December 1, 1940, would have been effective to permit the treasurer to complete the same at the annual sale and resale, even though the resale could not have been held until May, 1942.

The applicable rule is that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubt as to its constitutionality." Brown *v.* State Election Board, Okla., 170 P. 2d 200; West Okla. Digest, Constitutional Law, # 48.

4. Both the county treasurer, the intervener and amici curiae argue that section 23 of the 1923 paving statute (11 O. S. 1941 # 103), providing that the special assessment lien shall be "co-equal with the lien of other taxes" and shall "continue as to unpaid installments until such assessments and interest thereon shall be fully paid," became a part of the bonds and that the effect of that portion of section 1 of the 1939 statute, 11 O. S. 1941 # 242, above quoted, providing that the property against which the lien exists shall be by operation of law absolved of the lien or liability, if the bond holder fails to file suit to foreclose the lien or fails to signify his willingness to accept refunding bonds before the expiration of the limitation period prescribed by the section was to impair the obligation of the contract. In support of this contention, the case of Hann *v.* City of Clinton, 131 Fed. 2 978, is cited. The Parties also cite many cases holding that the law under which the bonds were issued entered into and became a part of the obligation of the bonds.

The plaintiff contends that section 1 of the 1939 act is but a statute of limitations, and that it afforded bond holders sufficient time to pursue their remedies before the bar was complete, and that the lien is a part of the remedy afforded by the 1923 statute for the enforcement of the rights of the bond holder, and that the remedy can be changed or taken away after the expiration of a reasonable time. The 1939 act became effective on May 12, 1939, and it did not purport to bar bonds then delinquent for more than three years, such as those involved in this case, until December 1, 1940, and the plaintiff contends that the period of more than 18 months given such bond holders to commence actions or proceedings to enforce their rights is reasonable. We do not understand that it is contended by the defendant, the intervener or amici curiae that the time allowed is unreasonably short.

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Those urging that the 1939 Act is unconstitutional cite cases adhering to the well-settled rule that the laws in force when and under which municipal bonds are issued enter into and become a part of the obligation of the bonds, but they overlook the fact that there is an exception to that rule that is as well settled as the rule itself. The exception is that limitation statutes do not enter into and become a part of the obligation of such bonds or other contracts. Case *v.* Pinnick, 186 Okla. 217, 97 P. 2d 58; Mires *v.* Hogan, 79 Okla. 233, 192 P. 811; 12 Am. Jur. 89; 34 Am. Jur. 28; 17 R. C. L. 680; 12 C. J. 1079; Cooley, Constitutional Limitations, 8th ed., page 760.

The appellants and amici curiae cite no case holding unconstitutional a statute of limitations applying to existing contract rights under which the parties are given a reasonable time after the statute becomes effective within which to enforce their rights.

They rely upon cases dealing with substantive rights or cases in which the remedy for the enforcement of contract rights is entirely taken away or changed in such a way as to affect substantial rights. Thus in Nelson *v.* Pitts, 126 Okla. 191, 259 P. 533, the statute held to impair the obligation of paving bonds could have the effect of extinguishing the lien before all the installments were due. The statute held unconstitutional in Moore *v.* Otis, 275 Fed. 747, had the effect of the statute in Nelson *v.* Pitts, and also had the effect of depriving the bond holder of any share in the proceeds of a tax resale thereby depriving the bond holders of the benefit of the co-equality provision. In Davis *v.* McCasland, 182 Okla. 49, 75 P. 2d 1118, the statute held unconstitutional authorized payment of assessments by delivery of bonds against the district, thereby changing the medium of payment, and lessening the value of the security. The statute held unconstitutional in Straughn *v.* Berry, 179 Okla. 364, 65 P. 2e 1203, released the accrued penalties on unpaid assessments and to that extent deprived the bond holders of a remedy without substituting another adequate one and also deprived him of the co-equality provision.

In United States *v.* City of Quincy, 18 L. Ed. 403, the statute in force when the bonds were issued granted the

city the right to assess and collect taxes necessary to pay the bonds. Later the Legislature limited the amount of taxes the city could collect, and gave the city a first right to the taxes collected for a special purpose, so that it was not certain any would be left for payment of the bonds, and no other remedy was given for collection of the bonds. The statute involved in United States *v.* City of New Orleans, 26 L. Ed. 395, is similar in effect to that involved in the City of Quincy case. In Seibert *v.* United States, 122 U. S. 284, the statute under which the bonds were issued entitled the bond holder to be paid by a tax to be levied and collected in the same manner as county taxes, and the subsequent act held to be unconstitutional provided that county taxes should be levied and collected by the direct action of the county court while all other taxes were to be levied in a more cumbersome manner requiring the action of the prosecuting attorney and the circuit court, which was held not to be the 'legal equivalent' of the prior method. In Worthen *v.* Kavanaugh, 79 L. Ed. 1298, 55 S. Ct. 555, 97 A. L. R. 905, at the time the special assessment bonds were issued the Arkansas statutes made effective provision for the collection of the assessments. The law held to be invalid repealed that law and did not substitute an adequate remedy, the new law being termed "oppressive" and making the remedy a mere "shadow." State *v.* City of Lakeland (Fla.), 150 So. 508, 90 A. L. R. 704, is similar to Worthen *v.* Kavanaugh, in that the only remedy available to the bond holders, mandamus, was so limited that it was not adequate. None of the foregoing authorities involved a statute of limitations.

In Wilson *v.* Standifer, 184 U. S. 399, it was held that an act of the Texas Legislature substituting an administrative method of forfeiture of the rights of one who had purchased State lands and was delinquent in his payments, for a judicial method of forfeiture in existence at the time the sale was made, did not impair the obligations of the contract, and quoted the following from Chief Justice Marshall:

> "• • •the distinction between the obligation of a contract and a remedy given by the legislature to en-

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force the obligation exists in the nature of things, and without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct."

In the recent case of Richmond Mortg. & Loan Corp. *v.* Wachovia Bank & T. Co., 300 U. S. 338, the true rule is stated as follows:

> "The Legislature may modify, limit, or alter the remedy for enforcement of a contract without impairing its obligations, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right. The particular remedy existing at the date of the contract may be altogether abrogated if another equally effective for the enforcement of the obligation remains or is substituted for the one taken away."

At the time of the enactment of the 1939 act, there was no statute of limitations applicable to the sale and resale by the county treasurer of property to satisfy street improvement liens, and at that time this court had not decided that the general statute of limitations applied to actions to foreclose such liens. The case of City of Bristow *v.* Groom, 194 Okla. 384, 151 P. 2d 936, so holding, was not decided until 1944.

The law is well settled that statutes of limitation may be made to apply to rights or causes of action against which there was no such statute in existence at the time they were created, or existing statutes may be shortened, and they may be made applicable to existing causes of action provided a reasonable time is allowed for their enforcement, and such statutes do not violate the constitutional provision against impairment of the obligation of contracts. Mires *v.* Hogan, 79 Okla. 233, 192 P. 811; Case *v.* Pinnick, 186 Okla. 217, 97 P. 2d 58; 34 Am. Jur. 26, note 14, 33, 36; 12 A. Jur. 89, note 6; United States *v.* Morena, 245 U. S. 392; Terry *v.* Anderson, 95 U. S. 365. It is clear that the

time allowed under the statute in question was not unreasonably short. 34 Am. Jur. 32.

> "An existing law of limitations is not considered as being a part of the contract. Hence, the legislature may enact a statute which limits the time within which actions may be brought to enforce demands where there was previously no period of limitation or which shortens the existing time of limitation and such a law may operate upon existing contracts without necessarily being invalid as impairing their obligations." 12 Am. Jur. 89.

We are of the opinion that the 1939 act did not have the effect of depriving the bond holders of any of the remedies that were then available to them until the period of limitations fixed by Section 1 should expire. Those whose rights were barred by the three year provision at the time the law became effective or whose rights would be barred by November 1, 1939, were given 18 months after the effective date of the act within which to pursue all such remedies. We think it is clear that, under the authorities just cited, it cannot be said that there was a contractual obligation not to impose a statute of limitations upon such remedies, and it was within the power of the legislature to do so. The question, then, is whether Section 1 of the 1939 Act, above quoted, is more than a statute of limitations, and whether the provision extinguishing the lien after the statutory period expired has the effect of unconstitutionally impairing the obligation of the contract existing between the bond holder and the city. We think not.

At the time of the enactment of the act in question, the delinquent special assessments for street improvement purposes had piled up in most of the cities and towns of the State, until the properties in many instances were not worth the amount of delinquent taxes and special assessments standing against them, rendering the properties unmarketable. This condition was brought about by the failure of the city clerks to certify to the county treasurers delinquent special assessments and by the failure of the county treasurers to hold resales and by the failure of the bond holders

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to commence foreclosures proceedings and proceedings to compel the city clerks to certify delinquent special assessments and by the failure of the county treasurers to enforce the special assessment liens under the tax sale and resale laws. The act was passed to remedy this condition by compelling bond holders to take steps to enforce their rights within the time limited, and barring actions and proceedings and absolving the properties from the statutory liens if they failed to do so. The provision absolving the properties from the liens was a part of and was intended to make effective the statute of limitations. That provision was consistent with 42 O. S. 1941, #23, which provides:

> "A lien is extinguished by the mere lapse of the time within which, under the provisions of civil procedure, an action can be brought upon the principal obligation."

In Wheeler *v.* Jackson, 137 U. S. 662, the court held valid a statute of New York applying a statute of limitations to tax certificates that had been outstanding for more than eight years at the time of the enactment of the statute, where at the time the certificates were issued they were subject to no statute of limitations, but giving the holders of such certificates six months within which to commence actions or proceedings to enforce their rights, and providing that after the expiration of such six months the tax authorities should cancel in their offices all such sales, if such *if such* action or proceeding should not be instituted, and providing further that "thereupon the lien of all such certificates of sale shall cease and determine." This case has never been departed from, and is in point.

The rule, then, is that the law under which a contract is made enters into and becomes a part of the obligation of the contract and applies to the remedies in the sense that the Legislature cannot take away the remedy without substituting another remedy substantially as effective as the prior remedy. The remedy may be changed so long as no substantial rights under the contract are affected. The imposing of a reasonable statute of limitations where none previously existed or reducing a period, leaving a reason-

able period to commence proceedings, is a permissible change in the remedy, and it does not violate the contract clause of the constitution, though it may incidentally affect the contract by denying the party the advantage of "biding his time" and delaying indefinitely the assertion of his rights while high interest piles up, which was the result in Wheeler *v.* Jackson, Case *v.* Pinnick, and other cases above mentioned.

In Curtis *v.* Whitney, 80 U. S. 513, it was held that a statute requiring the owner of a tax sale certificate to give notice of intention to demand a deed, when there *there* was no such requirement when the certificate was obtained.

In Home Bldg. & Loan Ass'n *v.* Blaisdell, 290 U. S. 398, 88 A.L.R. 1481, it was said:

> "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order."

The power to enact limitation laws is one of the sovereign powers which is read into contracts.

In 12 A. Jur. 86, it is said that "a lien created by statute for the payment of a debt is only a part of the remedy afforded by the law for its collection; a change of that remedy does not affect the obligation of the contract, even though the statute may operate retrospectively."

The Court in Hann *v.* City of Clinton, 131 Fed. 2d 978, cited no authority in support of its holding that the 1939 act is unconstitutional, and apparently gave no consideration to the above cited authorities, probably because its attention was not called to them.

The act in question is in harmony with several recent acts of the Legislature that had for their purpose the prompt collection of taxes and special assessments and imposing a period of limitations and extinguishing the rights after the bar of the statute had become complete. This and the other acts were brought about by the depression that set in *in* 1929, and continued for some eleven years. Thus in 1935 the Legislature enacted 62 O. S. 1941 # 482, fixing a period

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of limitations for municipal warrants and extinguishing the liability thereon if suit was not commenced within time but allowing time for the holder of bonds that had been outstanding the full period when the act was passed to sue on their bonds. This law was sustained against an attack similar to the attack in the present case in Case *v.* Pinnick, 186 Okla. 217, 97 P. 2d 58. In 1939 the Legislature enacted 68 O. S. 1941 # 4330, which imposed a period of limitation on the administrative enforcement of tax sale certificates, where no limitation previously existed, and cancelling the certificates after the limitation had run, and again allowing time for the holders of certificates that had been outstanding the full period when the act was passed to secure deeds. Agains in 1939 the Legislature enacted the Resale Statute (68 O. S. 1941 # # 432-432p) making it mandatory that the county treasurer annually hold sales and resales for the sale of real property to satisfy delinquent ad valorem taxes and special assessments, imposing penalties, and making it a removal offense for failure to do so. Then, at the same 1939 session of the Legislature the statute in question (11 O. S. 1941 ## 242-242o) was enacted, imposing a statute of limitations applying alike to the administrative method and the civil action method of enforcing paving assessments, allowing a reasonable time for the holders of bonds that had been delinquent the period prescribed for the enforcement of the liens, and absolving the property from the liens after the limitation period had fully run.

The fact that the refunding bonds provided for in the 1939 act provided that the bonds should be all on a par instead of giving the lower numbered bonds the preference as provided in the prior law and the fact that the assessments could be liquidated by surrendering the bonds do not render the law invalid. The bond holder was not required to accept refunding bonds, but, instead, could pursue his other remedies during the period allowed after the act became effective.

The 1923 statute does not say that the lien shall be perpetual. It is only be process of reasoning that such a contention can be made. We have held that the term "co-

equal'' refers to the rank of the lien. Service Feed Co. *v.* City of Ardmore, 171 Okla. 155, 42 P. 2d 853. It is from the provision that the lien shall continue until the assessments are paid that the duration of the lien is determined. But, as pointed out in Moore *v.* State, 43 N. J. L. 203; 39 A. St. Rep. 558, the reason that limitation laws do not become a part of the obligation of contracts is that parties look to performance and not breach of their contracts. The substantial obligation of the contract was that the bond holder should receive his money with interest when the bonds matured, and not that he could delay indefinitely taking steps afforded him for the enforcement of his rights.

Statutes of limitations are of two classes, (1) those which extinguish only the remedy and (2) those which extinguish both the remedy and the right. 34 A. Jur. 22. Our statute, 42 O. S. 1941 # 23, is of the second class. The 1939 act is also of the second class. Our attention is called to no decision, and we know of none, denying the right of the state to make a limitation law of the second class applicable to existing contracts. In Wheeler *v.* Jackson, 137 U. S. 662, such a statute was sustained. We think the constitutional power of the legislature to enact limitation laws, includes the right to make them either of the first or second class, and the courts cannot question the discretion of the Legislature in that regard. As was said in United States *v.* City of Quincy, above, ''nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, in deed, in the sense of the law, be said not to exist. * * * The obligation of the contract is the law which binds the parties to perform their agreement.'' It follows, then, that the contract is no more impaired by a statute of limitations that extinguishes the right along with the remedy than one *that extinguishes the right along with the remedy than one* that extinguishes only the remedy. A contract of the nature of the one here involved would be of no value without a remedy to enforce it. The contract clause refers to legal, not moral, obligations. 12 Am. Jur. 12.

Amici Curiae say the act under consideration is violative of not only the contract clause, but also of the due process

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clause and the equal protection clause of the State and Federal Constitution. However, their argument revolves around the contract clause. We are of the opinion, and hold, that the act violates neither clause of the Constitution.

Affirmed.

Concur: Davison, V.C.J., Riley, Bayless, Welch, Corn, JJ.

Dissent: Gibson, J.

EXHIBIT "D"

Comparative Statement of Bondholders' Rights

Under 1923 Act

NOTE: In force when assessments were levied and appellant's bonds were issued.

The Assessments

1. Assessments aggregating total cost of improvements levied against benefited properties pro rata, payable in ten annual installments due September 1st of ten consecutive years, each consisting of one-tenth of the total assessment plus 7% annual interest on the unmatured balance.

2. Assessments are declared a lien coequal with ad valorem taxes, which shall continue until fully paid. (This means paid or liquidated by tax or foreclosure sale. McGrath *v.* Oklahoma City, 156 Okl. 34, 9 P92d) 711. Validity of coequality provision sustained in Board of Com'rs of Seminole County *v.* City of Wewoka, 191 Okl. 142, 127 P(2d) 826.)

3. Unpaid installments bear penalty interest at 12% per annum after maturity until paid. (Such penalties become part of bond holders' lien and any legislation which deprives them of any portion of the lien impairs the contract and is void. Straughn *v.* Berry, 179 Ok. 364, 65 P(2d) 1203. Brown-Crummer Inv. Co. *v.* Paulter, 70 F(2d) 184.)

4. Upon maturity and non-payment, delinquent installments are to be certified by the city clerk to the county treas-

urer, and by him collected as other taxes, i.e., by delinquent tax sale and resale. (Delinquent special assessments, after certification to treasurer for collection are delinquent taxes. Oklahoma City *v.* Vahlberg, 185 Okl. 28, 89 P(2d) 962.)

5. Payment must be made in cash. (Davis *v.* McCasland, 182 Okl. 49, 75 P(2d) 1118.)

6. One year after delinquency, bond holder may sue in name of the city for forclosure of entire lien and accrued penalty. Judgment is in rem, and sale to be made with appraisement, as in sales under execution but subject to existing ad valorem taxes and other special assessments. (The act contains no limitation, but by City of Bristow *v.* Groom, 194 Okl. 384, 151,) P. 2d 936, May 29, 1944, a limitation of three years, eleven months after maturity of last installment was judicially imposed.)

The Bonds

1. Bonds are issued for total amount of assessments unpaid thirty days after passage of the assessing ordinance, in such denominations as shall be agreeable to city, and are negotiable.

2. Issued with negotiable interest coupons covering the interest prior to maturity.

3. Payable on or before October 1st succeeding maturity of last installment of assessments. May be called in serial order prior to maturity when funds are available for payment.

4. Bear 6% semi-annual interest prior to maturity, 10% after maturity.

5. Payable solely from assessments with interest and penalties collected thereon. (Payable only in cash. Davis *v.* McCasland, supra.)

6. Bonds to be issued in series and, together with interest, payable in serial order, both before and after maturity, the lowest numbered bond, with the accrued interest thereon, having priority of payment over all other bonds and interest

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thereon. (Held to be a contract right which could not be extinguished by subsequent legislation, Davis *v.* McCasland, supra. City of Wewoka *v.* Banker, 117 F(2d) 839.)

Under 1939 Act

(Senate Bill 164, Session Laws of 1939, effective May 12, 1939. Secs. 242 to 242o, Tit. 11, O. S. 1941.)

Note: The Act is set forth in full in the body of the Jurisdictional Statement, and was in force at the date of the institution of this cause. Secs. other than 242 were repealed, effective May 21, 1947.

Sec. 242 provides that the bond holder shall, within three years after maturity of his bonds, either sue to foreclose, or file his "Willingness to Accept Refunding Bonds," the details of which are explained below. On his failure to do one or the other, both his bonds and the assessments securing same are cancelled and extinguished. Refunding shall be at bondholder's expense, but proceedings not within his control.

The Assessments

1. Assessments are levied in a sum aggregating the total amount due on the bonds to be refunded, rather than the total of unpaid assessments. The governing body shall "scale down" the total of existing assessments to equal total due on bonds filed for refunding. This has the effect of relieving the most valuable properties, of a part of the original assessment liability, and thus impairs the contract. (Straughn *v.* Berry, supra.) The new assessments are made payable in the same manner as under the 1923 Act.

2. Declares the same character of lien as the 1923 Act.

3. Same as the 1923 Act.

4. Same as the 1923 Act.

5. Payment may be made either in cash or by the surrender of bonds or coupons.

6. Upon maturity and non-payment of any installment, bond holder may sue in the name of the city to foreclose

lien of total unpaid portions of the assessment and penalties accrued. Judgment is in rem. and sale is without appraisement, but subject to existing and unpaid ad valorem taxes and other special assessments. (No limitation upon the time of foreclosure is fixed by the act and no holding by any court on same, since no refunding bonds were in fact ever issued by any municipality under this act.)

The Bonds

1. Bonds were issued for total liability on bonds submitted for refunding, in denominations of multiples of $100.00. (This is impossible, for bonds of same series are most often owned separately by many parties, and total liability on bonds of any individual owner will not be a multiple of $100.00.

2. Issued with negotiable interest coupons covering the interest prior to maturity.

3. Payable eleven years after date, subject to partial payment prior thereto. Cannot be called prior to maturity.

4. Bear 6% interest, payable annually, until paid.

5. Payable from assessments, or property owner may acquire and use any bond or coupon to pay his assessment or any part thereof. (A like statute was held to be in violation of bond holders' contract and unconstitutional in Davis *v.* McCasland, supra.)

6. Bonds are issued without priority by serial number. (Hence, holder of low numbered bonds is compelled to surrender his right to priority of payment, and thus, the priority of his lien. Moreover, use of bonds in payment of assessment constitutes, a priority in payment of the bond so used.)

Partial payments may be made pro rata at any time funds are available therefor. (This provision is, of course, in conflict with the provision the property owner the right to acquire and pay assessments with bonds, for no provision is made for any payments to be made upon bonds not so

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used. It is also in conflict with the provision prohibiting the bonds being called prior to maturity.)

Summary

It is manifest that, if the bond holder seeks to avoid the cancellation of his bonds and the assessments securing same, by filing his "Willingness to Accept Refunding Bonds," he is thereby deprived of his property without due process of law, and his contract impaired in the following particulars:

(a) His vested, executed right, to-wit: his bond, is exchanged for a purely executory right.

(b) In order to secure refunding bonds, he must agree "to advance his proportionate share of the cost of such refunding procedure." No provision is made for him to recover this advancement.

(c) He must also abandon that part of his contract which provides for the payment of his bond in money and accept a bond which "may be used in payment of any special assessment instalment."

(d) He must surrender the priority which his bond enjoys over bonds of higher serial number and accept a bond payable pro rata with all other bonds of the series.

(e) The law under which his bonds were issued provides that the bonds must be called when sufficient cash is on had to pay same or was available for payment. The 1939 act provides that "neither said bonds nor coupons shall be so issued as to subject to call or redemption in cash before the date of maturity stated therein."

(f) The bond holder must surrender his right to payment in full and receive a bond and interest coupons subject to partial pro rata payment.

(g) Although the law under which his bonds were issued makes the city a trustee for all the bond holders, yet, under the 1939 act, the city issues refunding bonds only to those who file application therefor and advance their share of

the refunding cost. The other bond holders lose their bonds, which, together with the assessments securing same, are cancelled.

(h) The 1939 act reduces the duration of the lien securing the bonds from co-equality with ad valorem taxes (perpetual) to a limited term (three years after maturity).

(i) Although notice to bond holders of such refunding is contemplated by the 1939 act, "failure to give the notice provided herein shall not impair any of the provisions of this act." Thus, the rights of the bond holder could be completely extinguished without any notice to him.

EXHIBIT "E"

No. 32,427

VERNON BACUS, County Treasurer, etc.,

v.

W. F. BANKS

GIBSON, *J.*, dissenting:

I think the importance of the question involved justifies this expression of the reasons why I cannot concur in the majority opinion.

I consider the effect of the opinion is to declare operative as a statute of limitation that which under the law cannot be imposed by the Legislature or recognized by the courts as such; that same is violative of the obligations of contract which is inhibited by the Federal Constitution; that same is in contravention of the powers of the courts arising under grant by the Oklahoma Constitution; and that its overall effect is to place the approval of this court upon what amounts to the repudiation by a sovereign state of a power held in trust.

The sole basis that could exist, and the one relied on so existing, for the opinion, is that the limitation is procedural

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merely and thus applicable only to enforcement of remedies in contradistinction to substantive rights. What I deem to be the vice of the opinion is that it fails to fully recognize the fact that remedies of themselves may and in the instant case do constitute substantive rights and therefore are inviolate, and it ignores the controlling import of legal principles applicable thereto.

Prior to the issuance of the bonds under authority of the 1923 Act, and in order to give character thereto and to induce the public to invest, the law provided a careful, full and sure method for the payment thereof, wherein no duties or conditions were imposed upon the bondholder. Any contemplation that such could be imposed is precluded by the fact that each step in the process of collection is made the mandatory duty of the municipality and of those to whom the power of collection is delegated. And same was further advertised by making the bonds negotiable. The mandate of the law in the final analysis is that the city must collect the assessments and place same in a designated fund for disbursement, to which fund the bondholder is assured a right of recourse for the discharge of the bond. These specific provisions of law are not remedies afforded to existing rights, and thus subject to modification or recall. There are in no sense mere matters of legislative grace. There were offered contractually and the sole condition of the acceptance to make them obligations was the payment of the purchase price of the bonds, which is not questioned, hence the obligations became absolute, and beyond the power of the Legislature to recall without a remedy that was an equivalent.

In view of the holdings of this court, that neither the municipality nor the lot owner is personally liable on the obligation of the bonds, the vital character of the lien and the prescribed methods for the discharge of the obligation are of vital concern to the bondholder. And appraising such a situation this court in Nelson *v.* Pitts, 126 Okla. 191, 259, Pac. 533, 535, declared:

> "The bonds in question were accepted by purchaser in view of the provisions of the act under which they were issued. The law under which bonds of this char-

acter are issued, and under which contracts of this character are made, enters into and becomes an essential part of the contract. Oklahoma Cotton Growers' Ass'n *v.* Salyer, 114 Okla. 77, 243 Pac. 232; 6 R. C. L. p. 855; 13 C. J. 247; Deweese *v.* Smith, 66 L. R. A. 971; Armour Packing Co. *v.* U. S., 14 L. R. A. (N. S.) 400; Moore, Co. Treas., *v.* Otis et al., 275 Fed. 747; Moore *v.* Gas Securities Co. (C. C. A.) 278 Fed. 111."

Pertinent to the trust phase of the situation there was declared in Spitzer *v.* City of El Reno, 41 Okla. 430, 138, Pac. 797, 802, the following:

> "That such money, when collected from the various property owners, becomes a trust fund, to be used only for the particular purpose for which it was raised, and especially until all bonds and interest and other legal charges against said fund have been paid, there can be no doubt. See City of El Reno *v.* Cleveland Trinidad Paving Co., 25 Okla. 648, 107 Pac. 163, 27 L. R. A. (N. S.) 650; Ritterbusch, Co. Treas., *v.* Havinghorst, City Treas., 29 Okla. 478, 118 Pac. 138; Shultz *v.* Ritterbusch, 38 Okla. 478, 132, Pac. 961."

In Straughn *v.* Berry, 179 Okla. 364, 65 Pac. (2d) 1203, 1025, considering the same law under which the paving bonds in the instant case were issued (11) S. 1941, secs. 81-117), we declared:

> "The law existing at the time of the issuance of municipal bonds, and under the authority of which they are issued, enters into and becomes a part of the contract in such a way that the obligation of the contract cannot thereafter be in any way impaired, or its fulfillment hampered or obstructed by a change in the law."

And in recognition of the property right of the bondholder in the collection of the assessments and creation and disbursement of the trust fund, there is further declared:

> "The right of the bondholder to require that interest and penalties be collected and applied to payment of

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the bonds and interest coupons is a vested property right. Such right may not be divested by subsequent legislation."

In recognition of the soundness and controlling effect of these principles the Circuit Court of Appeals, Tenth Circuit, in Hann et al. *v.* City of Clinton ex rel., Schuetter, 131 Fed. (2d) 978, considering the 1939 law (11 O. S. 1941, sec. 242) which is upheld in the opinion, declared:

"Where paving bonds, issued under 1923 statute which provided that lien should continue until assessment and interest thereon should be paid in full, were outstanding when statute was enacted limiting right to enforce assessment lien to three years following maturity of bonds, such later statute did not affect the bonds since to absolve property of lien short of payment or sale of property for delinquent installments or other delinquent taxes would "mpair the obligation of contract," the provisions of the 1923 statute having become a part of the contract. 11 O. S. 1941 secs. 107, 103, 242."

What I consider to be an authoritative expression is the following, declared in the United States ex rel., Von Hoffman *v.* City of Quincy, 4 Wall. 535, 19 L. Ed. 403:

"It cannot be doubted, either upon principle or authority, that each of such laws passed by a state would impair the obligation of the contract, and the last mentioned not less than the first. Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against invasion. The obligation of the contract, 'is

the law which binds the parties to perform their agreement.'

Sturges *v.* Crowninshield, 4 Wheat, 122.

• • • • • • •

"No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the act is within the prohibition of the Constitution, and to that extent void.

• • • • • • •

"It is equally clear that where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation, in such cases, are equally bound. This power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other."

In the light of what has been said, I deem it manifest that the right of the bondholder to perpetuity of the lien and the exercise of the tax powers prescribed to meet the obligations of the bonds, considered independently of the provision for foreclosure by the bondholder, would be clearly beyond the power of the Legislature to directly impair without providing what in law would be deemed an equivalent. James M. Seibart, Collector etc., *v.* United States ex rel., 122 U. S. 284, 30 L. Ed. 1161; Louisiana *v.* New Orleans, 102 U. S. 203; United States ex rel., Wolff *v.* New Orleans, 103 U. S. 358, 26 L. Ed. 395; Cooley Const. Lim. 8th ed.) Vol. 1, p. 583. The remedy proposed by the 1939 Act is in no sense efficaceous. It is in substance an abridgement of existing remedies and that to be accomplished

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through an impairment of vested rights. (Cases last cited and Worthen ex rel. Board of Com'rs *v.* Kavanaugh, 55 S. Ct. 555, 79 L. Ed. 1298, 97 A. L. R. 905, and anno. note p. 911; Fidelity State Bank etc. *v.* North Fork Highway District, 35 Idaho 797, 209 Pac. 449, 31 A. L. R. 781.)

The remedy provided by foreclosure was merely cumulative and the failure to pursue the same in no wise impaired the right and duty of the county treasurer to proceed by sale and resale where not forestalled by foreclosure action. Oklahoma City *v.* Vahlberg Co., Treas., 185 Okla. 28, 89 Pac. (2d) 962.

If such remedy by foreclosure were purely a procedural action the application of the general statutes of limitation thereto, as was done in City of Bristow *v.* Groom, 194 Okla. 384, 151 Pac. (2d) 936, would be justified. On the other hand, if such remedy is a substantive right the sole justification for its impairment would be the fact there remained the equally effective remedy through tax sale proceedings. Richmond Mortgage & Loan Corp. *v.* Wachovia Bank & Trust Co., 300 U. S. 338. In the Groom case it is expressly recognized that the statute of limitation there applied would not be applicable to proceedings by the county treasurer. Such is a recognition of the fact such duties are without the field of the operation of statutes of limitation. I am of the opinion that such duties are not only without the field of the operation of statutes of limitation but, because of the duties are in the exercise of a power in trust, and a limitation upon the right to compel performance is contrary to established public policy and an infringement upon the power of the court to enforce contracts, as well as violative of the obligations of such contracts.

Under general law in force at the issuance of the bonds (Tit. 68, O. S. 1941, sec. 353), taxes upon real property were made a perpetual lien. And this court in construing the lien of special assessments has consistently held the lien thereof is coequal with the lien of other taxes "and as to unpaid installments and interest, such assessments and interest continue as a lien until they are fully paid." Settle *v.* Frakes, 156 Okla. 53, 9 Pac. (2d) 768; Runnels *v.* Citizens National Bank etc., 157 Okla. 94, 11 Pac. (2d) 173; Blythe *v.*

Pratt 171 Okla. 2, 41 Pac. (2d) 895; Service Feed Co. *v.* City of Ardmore, 171 Okla. 155, 42 Pac. (2d) 853.

We have seen that the duties of the treasurer are in the exercise of a power in trust. As to the integrity of such powers there is also to be borne in mind the definition and quality thereof under law existing at the time of the issuance of the bonds.

The nature of the power is defined in Tit. 60, O. S. 1941, sec. 183, as follows:

> "A power, as the term is used in this article, is an authority to do some act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner granting or reserving such power might himself perform for any purpose."

That the power here is one in trust is made to appear by section 189 of the same title, which is as follows:

> "A power is in trust when any person or class of persons, other than its holder, has, by the terms of its creation an interest in its execution."

The irrevocability is stated in sec. 196 of the same title as follows:

> "Every power, beneficial or in trust is irrevocable unless an authority to revoke it is given or reserved in the instrument creating the power."

And that its execution is imperative and imposes a duty which may be compelled by the bondholder is thus declared in sec. 292 of the same title:

> "Every trust power, unless its execution is made expressly to depend on the will of the trustee, is imperative and imposes a duty on the trustee, the performance of which may be compelled for the benefit of the parties interested."

The duty to convert the liens into cash through tax sales did not devolve upon the bondholder but did devolve upon

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the governmental agencies. The only delay in the conversion was through non-performance of such duty. Under the contract such delay could neither impair the lien nor the duty which was mandatory and irrevocable. Under the contract the State could not refuse performance of the duty nor limit the time of its performance short of a sale of the premises upon which the lien obtained. The effect of the 1939 act would be to accomplish indirectly that which under the Constitution it could not do directly. It places upon the bondholder the duty to foreclose which did not obtain under the contract. At the same time it abrogates the right to exact performance of the governmental duty which theretofore existed.

With the duty so shifted it imposes a time limit upon the action which if not timely pursued will result in the extinguishment of the lien. The makeshift is too artificial to be convincing. Under the doctrine of both the Von Hoffman-Quincy and Straughn-Berry cases(supra) the power and the duty of the governmental agencies were in trust and cannot be thrown aside upon a ground which is in fact but a breach of trust.

Considering the contract as embodying the existing laws, and especially the statutory provisions with reference to powers in trust, the power and duty to sell at tax sale was irrevocable and hence remained until performed. The duty to perform was unconditional and mandatory and therefor the bondholder had a vested right under the existing law to resort to mandamus to compel performance. To abrogate such duty, in which the bondholder has a vested right, prior to its performance, is beyond the legislative power under the constitutional limitations. And since such duty is unimpaired any limitation upon the right to exact performance through the medium of mandamus as the right obtained under the existing laws is not only villative of a vested contract right and inoperative by reason thereof but is further inoperative because it is an unauthorized infringement upon the judicial power of the district courts. The jurisdiction of the court to issue mandamus is *rerived* through the Constitution and not through any Act of the Legislature (Const. Art. VII, Section 10). It is a well settled rule that

judicial power cannot be taken away by legislative action and that any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional (11 Am. Jur. 908, and cases cited). And it follows that it cannot interfere with the power vested in the court to issue its prerogative writ of mandamus to enforce the performance of an official duty. This question was thoroughly considered in the case of State ex rel. Buckwalter *v.* City of Lakeland (Fla.), 150 So. 508, 90 A. L. R. 704, involving the same principle as here. We quote the third, fourth and fifth paragraphs of the syllabus:

> 3. A constitutional grant of power to the courts of the state to issue writs of mandamus vests in them full and complete authority to issue such writs to enforce the performance of the full and complete duty devolved by law upon any official.
>
> 4. A statute providing that in any mandamus suit by the holder of past-due municipal bonds or interest coupons, to compel payment thereof from money actually on hand in the interest and sinking fund, the peremptory writ, if issued, shall command the respondents to pay to relator only such pro rata portion of the fund as the relator's amount of past-due bonds or interest coupons bears to the whole amount of past-due bonds or interest coupons then unpaid and outstanding, is invalid as an attempt by the legislature to interfere with power vested in the courts by the state Constitution to issue writs of mandamus to enforce the performance of an official duty.
>
> 5. Power conferred upon the courts by the Constitution cannot be enlarged or abridged by the legislature."

It is further held therein that the Act in the respect indicated was an unconstitutional impairment of the obligation of the bondholders' contract.

In Oklahoma the duty to sell at the tax sale is a duty that is intermediate and preliminary in order to provide the fund to which the bondholder can look for relief and until such fund is created statutes of limitation as such can have

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no application because they would be contrary to public policy in placing a premium on dishonesty and fraud. Furthermore, the right to mandamus such sale is not in this jurisdiction subject to a statutory limitation. These propositions were established in this jurisdiction during territorial days, by the Supreme Court of the Territory of Oklahoma, in C. W. Barnes, Mayor, et al. *v.* C. W. Turner and James Kirkwood, 14 Okla. 284, 78 Pac. 108, and on appeal same was made unquestionable by the Supreme Court of the United States in Duke, Mayor, et al. *v.* Turner et al., 204 U. S. 623, 9 Anno. Cas. 842. The doctrines so announced are settled law in this jurisdiction. City of Sulphur *v.* State ex rel., Lankford, Bank Com'r., 62 Okla. 312, 162 Pac. 744; Board of Education of City of Duncan *v.* Johnston, 189 Okla. 172, 115 Pac. (2d) 132; Wilson *v.* City of Hollis, 193 Okla. 241, 142 Pac. (2d) 633.

The doctrine of said cases is not even considered in the opinion. And as authority for the application of the limitation on mandamus there is cited Wheeler *v.* Jackson, 137 U. S. 245, and Terry *v.* Anderson, 95 U. S. 628.

The Terry case involved a reduction in time of an existing limitation and hence the power to impose was not involved but accepted. It can have no application here where the power to impose is the question.

The Wheeler case is no more in point.

Under the law of New York a mandamus proceeding is an "action" or "civil action" within the meaning of statutes limiting civil actions. People *v.* Marsh, 82 N. Y. App. Div. 571, 81 N. Y. Supp. 579, affirmed in 178 N. Y. 618, 70 N. E. 1107 (cited in annotation 9 Ann. Cas. 845). In no event could the Wheeler case be in point without first assuming that in Oklahoma a mandamus action is to be classed with ordinary civil actions and thus amenable to statutes of limitations. However, independently thereof, the Wheeler case affords no parallel in its facts by reason of which the discussion therein could be helpful. Here, there is not involved mandamus to compel disbursement of a fund which had been created, but to compel the doing of something, that is preliminary and necessary to the creation of such fund. There, no duties preliminary to awarding the ulti-

mate relief obtained. The relief to which he was entitled was the ultimate relief a lease which he was entitled to receive on demand. There was involved no unperformed duty in which he had a vested right. His right was to demand and receive the lease, in substance the same as an action for specific performance. The holding was that he had no vested right to withhold demand. If in the instant case the assessments had been collected and placed in the fund as required and the bondholder, deeming it to his advantage to not demand payment, stood back and failed to do so, we would have a parallel situation.

The situation in the instant case was not and could not have been involved in the Wheeler case and hence nothing there said can afford a criterion herein.

In the majority opinion reference is made to conditions which had arisen by failure of county treasurers to perform their duties and that the act was passed to remedy such condition.

This indicates an attempt to justify the Act on authority of police power. The exercise of police power rests in the discretion of the Legislature and must square with public necessity. It is not to be accorded to an Act by the courts independently of a legislative intent. And such intent must be found in the phrasing of the law. Cooley, Const. Lim., 8th ed., Vol. 1, p. 1228; Home Building & Loan Assn. *v.* Blaisdell et al., 290 U. S. 398, 78 L. Ed. 413; Leonard *v.* State, 100 Ohio St. 456, 127 N. E. 464; Spann *v.* Dallas, 111 Texas 350, 235 S. W. 513, 19 A. L. R. 1387.

The 1939 Act not only fails to declare it is in exercise of police power but there is nothing in the Act to indicate as much. The Act does not purport to wipe the slate clean in the public interest. It recognizes the indebtedness, the lien and the right of enforcement. If shortening the period of enforcement was the purpose why should it not have been accomplished by compelling the county treasurers to act in accordance with duty already prescribed by the State? The reason is obvious. By shifting the duty to enforce collection to shoulders where for obvious reasons it could not be successfully borne and at the same time thereby exonerating the county treasurer from duty unless so coerced, there is

sought to be accomplished indirectly what could not be, and it is not sought to be, done directly. No public interest is even pretended.

The conditions referred to in the opinion are attributable to no fault of the bondholder and they arose through failure of the property owner to discharge the lien by payment of the assessments, which was the only basis upon which he was entitled to enjoy the property free from the lien, and also through the failure of the county treasurer to effect the collection of the assessments which he was in duty bound under the law to do for the use and benefit of the bondholder. Upon what theory can it be said that under such circumstances the State may repudiate its power in trust and thus reward a defaulting debtor at the expense of the creditor who loaned in reliance upon the pledged power?

I consider the holding and comment of the court in Rees *v.* Watertown, 19 Wall. 107, 22 L. Ed. 72, clearly in point here. It is there declared:

> "The remedies for the collection of a debt are essential parts of the contract of indebtedness, and those in existence at the time it is incurred must be substantially preserved to the creditor. This a statute prohibiting the exercise of its taxing power by the city to raise money for the payment of these bonds would be void."

And referring to conditions that reflected the result of nonfulfillment of the obligation, further said:

> "These theories are vicious. They are based upon the idea that a refusal to pay an honest debt is justifiable because it would distress the debtor to pay it. A voluntary refusal to pay an honest debt is a high offense in a commercial community and is a just cause of war between nations."

In my opinion the law applicable to, and the proper disposition of the issues herein, should be stated as follows:

I. The law existing at the time of the issuance of municipal bonds, and under the authority of which they are issued,

enters into and becomes a part of the contract in such a way that the obligation of the contract cannot thereafter be in any way impaired, or its fulfillment hampered or obstructed by a change in the law.

II. The remedy given by statute to holders of paving bonds issued pursuant to the 1923 Act to foreclose the lien of assessments in the district court is cumulative and in addition to the remedy by tax sale and resale by the county treasurer, and is without prejudice to bondholders' right to have collections made by such sales. (11 O. S. 1941, sec. 107).

III. The holders of street improvement bonds issued under the 1923 Act, have a vested property right in the lien of assessments levied and in the obligations imposed by the Act upon governmental agents to collect such levies by tax sales. (11 O. S. 1941, sec. 81 et seq.).

IV. The lien of assessments made for street improvements pursuant to the 1923 Act continues intact and unextinguished as to unpaid installments and interest until they are paid in full or merged into a valid sale thereof as for taxes, notwithstanding the provisions of the 1939 act (11 O. S. 1941, sec. 242).

V. The 1939 Act (11 O. S. 1941, sec. 242) to the extent same would impair an assessment lien levied pursuant to the 1923 Act (11 O. S. 1941, 81 et seq.) and remaining unpaid before same is merged in a valid tax sale of the property and to the extent same would impair the obligations of the municipality acting through governmental agents to make such sales in pursuance of the authority of the 1923 Act, is violative of the State and Federal Constitutions (Okla. St. Const. Ann., Art. 2, secs. 7 and 15; U. S. C. A. Const., Art. 1, sec. 10, cl. 1; Amend. 14).

VI. Where pursuant to legislative grant of power a municipality levies assessments to provide a fund for payment of paving bonds, which are sold, the power granted and the exercise thereof become a trust which the municipality through the designated agencies is bound to execute. And during the continuance thereof statutes of limitation

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will not run against the bondholder, who is a beneficiary, and in favor of the municipality, which is the trustee.

VII. The constitutional grant of power to the courts of this State to issue writs of mandamus vests in them full and complete authority to issue such writs to compel the performance of any act which the law specifically enjoins as a duty, resulting from an office or trust.

VIII. Powers conferred upon the court by the Constitution cannot be abridged by the Legislature.

IX. The provisions of the 1939 Act (11 O. S. 1941, sec. 242) placing a limitation upon the time within which application for and issuing of writ of mandamus may be had to compel a tax sale for delinquent assessments which is mandatory under the provision of the 1923 Act (11 O. S. 1941, sec. 83 et seq.) is an unconstitutional impairment of the right of holder of bonds issued thereunder and is further invalid as an attempt by the Legislature to interfere with power vested in the courts by the State Constitution to issue such writs.

X. Tit. 12, O. S. 1941, sec. 95 (2d subd.) providing that an action on liability created by statute is barred after three years from accrual, has no application to sale of land for delinquent assessments by county treasurer at a tax sale.

In my opinion investors in municipal bonds in Oklahoma will do so without any assurance or security that the statutes which are written into the bonds at the time of their issuance will remain therein but that they may be withdrawn by the Legislature without adequate substitutes being made.

For the foregoing reasons I respectfully dissent.

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 618

A. F. REEDER,
Appellant,

VERSUS

W. F. BANKS: ERNEST MORRIS, COUNTY TREASURER OF WASHITA COUNTY, OKLAHOMA,
Appellees.

Appeal from the Supreme Court of the State of Oklahoma

BRIEF OF APPELLANT IN RESPONSE TO MOTION TO DISMISS OR AFFIRM

LOCKWOOD JONES,
Cordell, Oklahoma;

ARNOLD T. FLEIG,
917 Perrine Building,
Oklahoma City, Oklahoma;

W. R. BANKER,
Manhattan Building,
Muskogee, Oklahoma;

SOLON W. SMITH,
Tradesmens Nat'l. Bank Bldg.,
Oklahoma City, Oklahoma,
Attorneys for Appellant.

FEBRUARY, 1948.

KING LAW BRIEF COMPANY, 418 NORTHWEST THIRD, OKLAHOMA CITY—PHONE 3-2969

INDEX

	PAGE
Statement	1
Authority:—	
Baccus v. Banks (No. 32,427, Supreme Court of Oklahoma), Oklahoma Bar Journal of November 1, 1947, Volume 18, No. 38, Page 1577 (Not Officially Reported)	1
Statement of Grounds on Which Jurisdiction of this Court is Invoked.	2
Authority:—	
Charleston Fed. Savings & Loan v. Alderson, 65 S. Ct. 624, 324 U.S. 182, 89 L. ed. 857	3
County Court of Ralls County v. U. S. ex rel. Douglas, 26 L. ed. 574	4
Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 66 L. ed. 239, 42 S. Ct. Rep. 106	3
Hann v. City of Clinton (C.C.A. 10), 131 Fed.(2d) 978	4
Jett Bros. Distilling Co. v. Carrollton, 252 U.S. 1, 64 L. ed. 421	3
Louisiana ex rel. Hubert v. New Orleans, 215 U.S. 170, 54 L. ed. 144, 30 S. Ct. 40	4
Louisiana ex rel. Nelson v. Police Jury, 28 L. ed. 574	4
Memphis Nat. Gas Co. v. Beiler, 62 S. Ct. 857, 315 U.S. 649, 86 L. ed. 1090	3
Rees v. Watertown, 19 Wall. 107, 22 L. ed. 72	4
Seibert v. Lewis, 122 U.S. 284, 30 L. ed. 1161	4
U. S. ex rel. Wolff v. City of New Orleans, 103 U.S. 358, 26 L. ed. 395	4
Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403	4

PAGE

Western Turf Association v. Greenberg, 204 U.S. 359, 27 S. Ct. Rep. 384, 51 L. ed. 520 3
Worthen Company, Trustee v. Kavanaugh, 79 L. ed. 638, 55 S. Ct. 555, 97 A.L.R. 905 4
Rule 28, Supreme Court of Oklahoma 2
Title 28, U.S.C.A., Section 344 3
1939 Session Laws of Oklahoma, Page 156 (Senate Bill 164) 2

Statement of the Case 5

Authority:—

Oklahoma Statutes Annotated, Sections 242 to 242o, inclusive 5
O.S. 1941, Title 11, Section 242 6, 8
Constitution of the United States, Article 1, Section 10 12

Nature of Contract Involved Herein 12

Authority:—

Board of County Commissioners of Seminole County v. City of Wewoka ex rel. North, 191 Okla. 142, 127 Pac.(2d) 826 15
Board of County Commissioners of Seminole County v. City of Wewoka ex rel. Merten, 191 Okla. 233, 129 Pac.(2d) 83 15
Boles v. Aikman, 157 Okla. 172, 11 Pac.(2d) 479 15
Bradford v. Schumucker, 135 Fed.(2d) 991 15
Criswell v. Hart, 155 Okla. 159, 8 Pac.(2d) 70 15
Davis v. McCasland, 182 Okla. 49, 75 Pac.(2d) 1118 16
Hann v. City of Clinton, 131 Fed.(2d) 978, 275 Fed. 747 15, 16
Hedges v. Groom, 194 Okla. 384, 151 Pac.(2d) 936 14
Louisiana ex rel. Hubert v. New Orleans, 215 U.S. 170, 54 L. ed. 144, 30 S. Ct. 40 16
McGrath v. Oklahoma City, 156 Okla. 34, 9 Pac.(2d) 711 15

BLEED THROUGH = POOR COPY

PAGE

Moore v. Otis, 275 Fed. 747 16
Nelson v. Pitts, 126 Okla. 191, 259 Pac. 533, 53 A.L.R. 1137 16
Oklahoma City v. Vahlberg, 185 Okla. 28, 89 Pac.(2d) 962 14
Runnels v. Citizens National Bank, 157 Okla. 94, 11 Pac.(2d) 173 15
Service Feed Company v. City of Ardmore, 171 Okla. 155, 42 Pac.(2d) 853 15
Settles v. Frakes, 156 Okla. 53, 9 Pac.(2d) 768 15
Straughan v. Berry, 179 Okla. 364, 65 Pac.(2d) 1203 16
Town of Medford ex rel. Fuss v. Early, 194 Okla. 566, 153 Pac.(2d) 633 15
Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403 16
Worthen Co. v. Kavanaugh, 79 L. ed. 638, 55 S. Ct. 555, 97 A.L.R. 905 16
Chapter 173, Session Laws of 1923, Sections 1 to 35 (O.S.A., Title 11, Sections 81 to 113, inclusive and 151, 152) 12
Title 11, O.S.A., Section 101 13
Title 11, O.S.A., Section 103 13
Title 11, O.S.A., Section 105 13
Title 11, O.S.A., Section 106 14
Title 11, O.S.A., Section 107 14
Title 68, O.S.A., Section 353 15
Title 68, O.S.A., Sections 381, 382, 383 14
Title 68, O.S.A., Section 432 14

Argument 17

Proposition I: The defendant in the trial court did not, in that court or in the State Supreme Court on appeal, raise the constitutional question here sought to be raised by the intervener, A. F. Reeder, and for that reason said intervener cannot now do so. 17

PAGE

Authority:—

Braxton County Court v. West Virginia, 208 U.S. 192, 52 L. ed. 450, 28 S. Ct. 275 18
City of Savannah v. Jesup, 106 U.S. 563, 27 L. ed. 276 18
City of Shawnee v. Taylor, 191 Okla. 687, 132 Pac. (2d) 950 18
Ex parte Jordan, 94 U.S. 248, 24 L. ed. 123 18
Hassall v. Wilcox, 29 L. ed. 504, 115 U.S. 598 18
Stewart v. Kansas City, 239 U.S. 14, 60 L. ed. 120, 36 S. Ct. 15 18
Second Edition, Section 2404, Page 511 18
Cyclopedia of Federal Procedure, Volume 10,
Cyclopedia of Federal Procedure, Volume 10, Second Edition, Section 5001 18
Cyclopedia of Federal Procedure, Volume 10, Second Edition, Section 5006, Page 473 19
Title 11, O.S.A., Section 105 18
Title 11, O.S.A., Section 106 17
Title 68, O.S.A., Section 383 18
Title 68, O.S.A., Section 432 18

Proposition II: Consideration of the constitutional question herein presented was not necessary in the State Supreme Court in order to affirm the judgment of the trial court, because the paving lien sought to be enforced by intervener, appellant herein, had been extinguished by lapse of time and laches, as provided by Oklahoma statute enacted prior to the issuance of said paving bonds and upheld by the Oklahoma Supreme Court decisions which have never been reversed or modified. 19

Authority:—

Baccus v. Banks, Volume 18, No. 38, Page 1577, Oklahoma Bar Journal, November 1, 1947 20
Bailey v. Oklahoma City, 157 Okla. 96, 11 Pac. (2d) 113 22
Board of Education v. Johnston, 189 Okla. 172, 115 Pac. (2d) 132 22

PAGE

City of Healdton ex rel. Rewoldt v. Pickens, No. 32,570, Supreme Court of Oklahoma, Oklahoma Bar Journal of January 10, 1948, Page 10, Volume 19, No. 1 (Pending on Rehearing) 21, 22

International Steel and Iron Company v. National Surety Company (Tenn., 1936), 56 S. Ct. 619, 297 U.S. 657, 80 L. ed. 961 19

State of Indiana ex rel. Anderson v. Harry Brand, Trustee, 303 U.S. 95, 82 L. ed. 685, 58 S. Ct. 443, 113 A.L.R. 1482 19

Wilson v. City of Hollis, 193 Okla. 241, 142 Pac. (2d) 633 22

Title 11, O.S. 1941, Sections 103 ..... 21, 22

Title 42, O.S. 1941, Section 23 ..... 20, 22

Proposition III: The intervener below and appellant herein did not have sufficient interest in the subject matter of the action because this Court has no way of knowing "that there was and is not sufficient funds in the city clerk's hands, collected from other lots in said district with which to pay intervener's bonds * * *." 23

Proposition IV: The appeal is frivolous because the question has been repeatedly decided by this Court against our contention. 24

Authority:—

Barnitz v. Beverly, 163 U.S. 118, 41 L. ed. 93, 16 S. Ct. 1042 26

Curran v. Arkansas (U.S.), 15 How. 304, 14 L. ed. 705 26

Hedges v. Groom, 194 Okla. 384, 151 Pac. (2d) 936 27

McGrath v. Oklahoma City, 156 Okla. 39, 9 Pac. (2d) 711 27

Service Feed Co. v. City of Ardmore, 171 Okla. 155, 42 Pac. (2d) 853 27

PAGE

Woods v. State, 125 Okla. 287, 250 Pac. 778, 53 A.L.R. 1128 28
12 Am. Jur., Section 432, Page 69 24
12 Am. Jur., Section 432, Page 71, Note 12 and 13 25
Title 11, O.S.A., Section 152 27
O.S. 1941, Title 11, Section 242 28

Proposition V: The validity of the 1939 Act was preserved by the following proviso: "Provided, however, that in all cases where the period of limitation herein mentioned has expired or will expire prior to November 1, 1939, the holder of such bonds shall have until December 1, 1940, in which to pursue his remedy or obtain the benefits of this Act." 29

Authority:—

City of Healdton ex rel. Rewoldt, v. Pickens, Okla. Bar Journal, January 10, 1948, Page 10, Volume 19, No. 1 32
Hedges v. Groom, 194 Okla. 384, 151 Pac. (2d) 936 33
Seibert v. Lewis, 122 U.S. 284, 30 L. ed. 1161 34
Service Feed Co. v. City of Ardmore, 171 Okla. 155, 42 Pac. (2d) 853 33
Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403 34
Title 11, O.S.A., Section 242 33
Title 68, O.S.A., Section 432n 29
Title 68, O.S.A., Section 432o 30

Proposition VI 35

Proposition VII 35

Proposition VIII: The record fails to show that any Federal question involving the obligation of contracts was necessarily decided by the Oklahoma Supreme Court. 35

PAGE

Authority:—

43 Am. Jur., Page 276, Public Securities and Obligations, Section 9 35
11 O.S. 1941, Section 106 36
11 O.S. 1941, Section 107 36

Proposition IX: The record fails to show that any Federal questions involving a denial of due process of law or equal protection were necessarily decided by the Supreme Court of Oklahoma. 36

Authority:—

Article 1, Section 10, Constitution of the United States 36

Proposition X: The record does not present for decision any substantial Federal question for the reason that identical questions have been decided adversely to appellants' claims by the United States Supreme Court. 37

Authority:—

Boeing Airplane Co. v. Board of County Commissioners (Kan.), 188 Pac.(2d) 429 37
County Court of Ralls County, v. U. S. ex rel. Douglas, 26 L. ed. 1220 41
Hann v. City of Clinton (C.C.A. 10), 131 Fed.(2d) 978 ..... 42, 43, 44
Louisiana ex rel. Hubert v. New Orleans, 215 U.S. 170, 54 L. ed. 144, 30 S. Ct. 40 41
Louisiana ex rel. Nelson v. Police Jury, 28 L. ed. 574 41
National Surety Co. v. Architectural Decorating Co., 226 U.S. 275 ..... 38, 40
Rees v. Watertown, 19 Wall. 107, 22 L. ed. 72 41
Seibert v. Lewis, 122 U.S. 284, 30 L. ed. 1161 41
Terry v. Anderson, 95 U.S. 628, 24 L. ed. 365 ..... 38, 39
Turner v. People of the State of New York, 168 U.S. 89 ..... 38, 39

PAGE

U. S. ex rel. Wolff v. City of New Orleans, 103 U.S. 358, 26 L. ed. 395 41
Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403 41
Wheeler v. Jackson, 137 U.S. 245 38
Worthen Co. v. Kavanaugh, 79 L. ed. 638, 55 S. Ct. 555, 97 A.L.R. 905 41
Constitution of the United States, Article 1, Section 10 42
Fourteenth Amendment 42
Title 11, O.S.A., Sections 221 to 240 43
Title 11, U.S.C.A., Section 401, et seq. 44
Title 42, O.S. 1941, Section 23 37

Conclusion 45

Appendix

IN THE SUPREME COURT OF THE UNITED STATES

No.

A. F. REEDER,
Appellant,

VERSUS

W. F. BANKS: ERNEST MORRIS, COUNTY TREASURER OF WASHITA COUNTY, OKLAHOMA,[1]
Appellees.

Appeal from the Supreme Court of the State of Oklahoma

BRIEF OF APPELLANT IN RESPONSE TO MOTION TO DISMISS OR AFFIRM

This brief is filed in response to appellee, W. F. Banks' motion to dismiss, filed and served on appellant, February 6, 1948 and supplemental motion to dismiss, filed and served on appellant, February 13, 1948.

This case is an appeal from a judgment of the Supreme Court of the State of Oklahoma in *Baccus* v. *Banks*, No.

[1]Successor to Vernon Baccus, former County Treasurer of Washita County, Oklahoma, substituted by order of Court of January 28, 1948.

32,427, not yet officially reported in the Oklahoma Reports, but reported in Oklahoma Bar Journal, November 1, 1947, Volume 18, No. 38, Page 1577.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

1. This is an appeal from a final judgment rendered in the Supreme Court of the State of Oklahoma, on the 28th day of October, 1947, same being the highest court of the State of Oklahoma in which a decision could be had, in which was drawn in question the validity of a statute of Oklahoma, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

2. Petition for rehearing was filed in the Supreme Court of the State of Oklahoma, on November 10, 1947, same being within fifteen (15) days of said judgment, as provided by Rule 28 of the Supreme Court of the State of Oklahoma; said petition for rehearing was denied on January 6, 1948, and this appeal was docketed in the Supreme Court of the United States within the time provided by law.

3. The statute involved in the Supreme Court of the State of Oklahoma is Senate Bill 164, 1939 Session Laws of Oklahoma, Page 156, said statute being relied on solely by the Supreme Court of the State of Oklahoma as grounds for its judgment, and specifically held to be constitutional.

There was drawn in question in the trial court and in the State Supreme Court the validity of said 1939 Act on

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the ground of its being repugnant to the United States Constitution.

4. The provisions of the United States Constitution invoked by appellant in the trial court and in the Supreme Court of the State of Oklahoma were, and are Article 1, Section 10, and the Fourteenth Amendment.

5. The Act of Congress on which jurisdiction of this Court is invoked is Title 28, U.S.C.A., Section 344, and the cases believed to sustain jurisdiction are *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 66 L. ed. 239, 42 S. Ct. Rep. 106; *Jett Bros. Distilling Co.* v. *Carrollton*, 252 U.S. 1, 64 L. ed. 421; *Western Turf Association* v. *Greenberg*, 204 U.S. 359, 27 S. Ct. Rep. 384, 51 L. ed. 520; *Memphis Nat. Gas Co.* v. *Beiler*, 62 S. Ct. 857, 315 U.S. 649, 86 L. ed. 1090; *Charleston Fed. Savings & Loan* v. *Alderson*, 65 S. Ct. 624, 324 U.S. 182, 89 L. ed. 857.

6. The Federal question is a substantial one as evidenced by the following considerations:

(a) The Federal question was the sole basis for the judgment of the Supreme Court of the State of Oklahoma.

(b) Said judgment was not a unanimous one. Mr. Justice Gibson prefaced his extended dissenting opinion by stating:

> "I think the importance of the question involved justifies this expression of the reasons why I cannot concur in the majority opinion.
>
> "I consider the effect of the opinion is to declare operative as a statute of limitation that which under the law cannot be imposed by the Legislature or recog-

nized by the courts as such; that same is violative of the obligations of contract which is inhibited by the Federal Constitution; that same is in contravention of the powers of the courts arising under grant by the Oklahoma Constitution; and that its overall effect is to place the approval of this Court upon what amounts to the repudiation by a sovereign state of a power held in trust."

(c) Said judgment is in direct conflict with the judgment of the United States Circuit Court of Appeals, Tenth Circuit, rendered November 17, 1942, *Hann* v. *City of Clinton*, 131 Fed. (2d) 978, in which the Oklahoma Legislative Act under attack was held to unconstitutionally impair the obligation of contract.

(d) Said Federal question is not precluded by other cases of this Court, all as set forth in our jurisdictional statement.

(e) The Federal question is governed by:

Von Hoffman v. *Quincy*, 4 Wall. 535, 18 L. ed. 403;

Seibert v. *Lewis*, 122 U.S. 284, 30 L. ed. 1161;

U. S. ex rel. Wolff v. *City of New Orleans*, 103 U.S. 358, 26 L. ed. 395;

Louisiana ex rel. Hubert v. *New Orleans*, 215 U.S. 170, 54 L. ed. 144, 30 S. Ct. 40;

County Court of Ralls County v. *U. S. ex rel. Douglas*, 26 L. ed. 1220;

Louisiana ex rel. Nelson v. *Police Jury*, 28 L. ed. 574;

Rees v. *Watertown*, 19 Wall. 107, 22 L. ed. 72;

Worthen Company, Trustee v. *Kavanaugh*, 79 L. ed. 638, 55 S. Ct. 555, 97 A.L.R. 905.

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STATEMENT OF THE CASE

This presents a situation wherein special assessment bonds issued in 1929, and the assessments pledged to the payment of said bonds were cancelled and extinguished by an Act of the Oklahoma Legislature in 1939, same being Senate Bill No. 164, set forth as Sections 242 to 242(o), Oklahoma Statutes Annotated 1941 (hereinafter referred to as O.S.A.).[2]

The question is whether or not said Act, and particularly Section 242, which purports to extinguish said bonds and said liens, and which extinguishes all remedies and methods of collection after the period prescribed in said Act is an impairment of the obligation of contract of appellant bondholder in violation of Article 1, Section 10, of the Constitution of the United States, and a taking of his property without due process in violation of the Fourteenth Amendment to the Constitution of the United States.

This action was commenced October 29, 1945, by filing in the District Court of Washita County, Oklahoma, a petition for injunction by W. F. Banks, a property owner, against Vernon Baccus, County Treasurer of Washita County, Oklahoma, to enjoin the County Treasurer from selling plaintiff's property for the special assessments securing appellant's bonds at the forthcoming November, 1945 tax sale (R. 9).

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[2]Act set forth in full in Appendix.

Plaintiff alleged that, during the year 1929, paving District No. 8 was created; that bonds[3] were issued dated March 16, 1929, payable solely from said special assessments; that the last of "said paving bonds, assessments, installments, interest and penalties, according to the face thereof, became and were past due and delinquent on March 17, 1939." Plaintiff alleged that "in 1939 the Legislature of the State of Oklahoma passed a law, being O.S. 1941, Title 11, Section 242, which reads, in part, as follows:

> "From and after the effective date of this Act, the right of any holder to enforce the lien of any street improvement bond issued under authority of Chapter 10, Article 12, Oklahoma Revised Laws of 1910, or of any street improvement bond or refunding street improvement bond issued under any authority contained in Chapter 33, Article 14, Oklahoma Statutes of 1931, and statutes supplementary and amendatory thereto, by foreclosure, mandamus, refunding or otherwise, shall be barred upon the expiration of three years immediately following the maturity date named in the face of such bond, unless the holder of any such bond shall have commenced suit to foreclose his lien by filing an action for that purpose and procuring service of summons therein or shall have evidenced his willingness to accept street improvement refunding bonds issued under the provisions of this Act, in exchange therefor, prior to the expiration of said three-year period of limitation; * * * The running of the period of limitation herein fixed shall be an absolute bar to any action or proceeding brought thereafter whether the same is plead as a defense or not, and the property against which such bonds theretofore represented a lien shall thereafter be, by operation of law, absolved of any lien or liability on account of said bond."

[3]All of said bonds are identical except for number, except Bond No. 1, which is in an odd amount.

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Plaintiff then alleged that the bondholders had not brought an action to foreclose nor evidenced their willingness to accept refunding bonds in exchange for said paving bonds, all as commanded in said Act; so that the bonds and the liens securing them no longer existed and were extinguished by said statute, by reason of which the county treasurer should be permanently enjoined from attempting to sell said property for said lien.

The county treasurer admitted the creation of the paving district, and that the liens were delinquent, and that he was about to sell the property for the purpose of satisfying said lien (R. ___).

Thereafter, A. F. Reeder, appellant herein, sought permission to intervene, asserting that he owned Bonds No. 34 to 39, inclusive, in said paving district, payable solely from special assessments levied in said district (R. 16). An order permitting intervention was made, the court stating:

> "* * * and that the proceeds of said sale, if conducted, will be applied to retire petitioner's bonds and therefore petitioner is vitally interested in the outcome of this litigation, and is therefore entitled to intervene"

Intervenor filed his answer asserting his ownership of the bonds, and admitting the delinquent assessments (R. 21). Intervenor further admitted that "the Legislature of the State of Oklahoma in the year 1939 enacted the statute alleged and referred to in plaintiff's petition, but petitioner alleges that the street improvement bonds issued as above set forth by said city were issued pursuant

to the 1923 paving law of the State of Oklahoma and that said law became a part of said bonds and that the said Act of the Legislature of 1939 is unconstitutional and void insofar as intervenor's bonds are concerned, for the reason that such Act of said Legislature is and was an attempt to impair the obligation of the contract; that said 1923 paving law provided, among other things, that the assessments made should and would become a lien against said property until the same was paid" (R. 22).

Thereafter, the plaintiff filed a demurrer to the answer of defendant and intervenor, asserting that neither of them stated a defense (R. 30 and 31), and the court entered its judgment sustaining the demurrer to the answer, and a permanent injunction was granted (R. 28). The court found in its judgment that "the sole and only question involved herein is the question of the constitutionality of the 1939 Act of the Legislature of the State of Oklahoma, the same being Section 242, Title 11, O.S. 1941, and the court further finds that said Act is constitutional and that said demurrer should in all things be sustained." The court then decreed that the county treasurer be permanently enjoined from selling the real estate involved for delinquent special assessments.

Notice of appeal from that judgment was given by Vernon Baccus, County Treasurer, and by the appellant, A. F. Reeder, who was intervenor below. In appellant's petition in error to the Supreme Court of the State of Oklahoma, he alleged, complaining of the Honorable Trial Court:

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"1. Said Court erred in sustaining the demurrer of plaintiff to the answer of the said Vernon Baccus, County Treasurer of Washita County, Oklahoma.

"2. Said Court erred in rendering judgment for plaintiff and granting the permanent injunction therein issued.

"3. Said Court erred in ruling that the Act of the Legislature of the State of Oklahoma passed in 1939, the same being Section 242, Title 11, O.S. 1941, is constitutional."

On Page 17 of brief of plaintiff in error (appellant here), in Case No. 32,427, in the Supreme Court of the State of Oklahoma, the following appears:

"PROPOSITION I[4]

"Senate Bill 164 O.S. 1939, Sections 242 to 242(o) inclusive, Title 11, O.S.A., is unconstitutional and void and therefore the judgment of the court is contrary to law."

And said brief further stated (R. 55a):

"It is our contention that the 1939 Act of the Legislature is unconstitutional and void insofar as it concerns special assessment bonds issued prior to its enactment, for the reason that it impairs the obligation of the original contract and deprives the bondholder of his due process of law as guaranteed by Section 15, Article 2 of the Constitution of Oklahoma, and Section 10, Article 1, of the Constitution of the United States, which said Acts are as follows: Section 10, Article 1, Constitution of the United States, provides as follows:

" 'No state shall * * * pass any bill of attainder, *ex post facto law*, or law impairing the obligation of contract * * *.'

[4]This was the sole proposition presented.

"Section 15, Article 2, Constitution of Oklahoma, provides:

" 'No bill of attainder, *ex post facto law*, nor any law impairing the obligation of contracts shall ever be passed.' "

In the aforementioned judgment of the Supreme Court of the State of Oklahoma, the judgment of the trial court in sustaining the demurrer and granting a permanent injunction was affirmed; and the Supreme Court concluded by holding that the Act violated neither the due process and equal protection clause, nor the contract clause of the State and Federal Constitutions.

The court held that the Act not only barred judicial proceedings, to-wit: foreclosure proceedings by the bondholders, but also barred tax sale proceedings by the county treasurer, which was the method enjoined by the court in this case, although this method of collection was exerciseable only by the county treasurer for the benefit of the bondholders. The court held this tax sale to be a "remedy" which had been extinguished by the 1939 Act. The court also held that the bondholder could not compel the performance of this "remedy" by the county treasurer by mandamus.

That court held that the extinguishment of the method of collection by the county treasurer was not an impairment of the obligation of contract but was merely a statute of limitations and was valid as to pre-existing rights, the court finding that the period of limitation was not unreasonable.

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The holding of the State Supreme Court may be set forth syllogistically as follows:

MAJOR PREMISE: *The tax sale proceeding* (provided for in the 1923 Act for collection of assessment liens created for payment of bondholders' bonds, and extinguished after the prescribed period by the 1939 Act) *was only a remedy*, separable from the substantive rights of the bondholders.

MINOR PREMISE: Remedies may be withdrawn or taken away within a prescribed period (such a taking is termed a statute of limitations) without impairing the obligation of contract or taking of property without due process of law, and upon the extinguishment of the remedy, the right may also be extinguished. The only condition is that the prescribed period be a reasonable one.

CONCLUSION: The prescribed period for withdrawal of said remedy herein was a reasonable one. Therefore, the remedy and the right were both extinguished and under the foregoing premises, such extinguishment did not violate either state or Federal constitutions.

The basic fallacy lies in the major premise, although the minor premise and conclusion are both incorrect.

The tax sale proceeding given under the 1923 Law is not a remedy separable from substantive rights regardless of how described, but is implicit in bondholders' right. It is "flesh and bone" thereof and the most important incident of bondholders' right. Therefore, the major premise is incorrect.

The minor premise is incorrect in stating that the right may be taken away with an extinguishment of the remedy because the right can never be taken away by subsequent legislation, that being the very thing prohibited by the Federal constitution (Art. 1, Sec. 10).

The conclusion is incorrect because, assuming the tax sale procedure to be a remedy, the period given the bondholder was not reasonable. A given period presupposes a right to avoid the bar of the statute and the bondholder had no such right.

NATURE OF CONTRACT INVOLVED HEREIN

We think it appropriate to make a brief preliminary statement in explanation of the nature of the contract right involved herein.

Appellant's bonds were issued pursuant to Chapter 173, Session Laws of 1923, Sections 1 to 35, which are set forth in the Oklahoma Statutes Annotated as Title 11, Sections 81 to 113, both inclusive, and 151 and 152.

After the creation of the district and the completion of the improvements, assessments are levied against the benefitted properties, and bonds, payable from said assessments, are delivered to the contractor in payment of his work (Title 11, O.S.A., Section 152). The provision of these bonds is set out in Title 11, O.S.A., Section 151. These bonds are not a liability of the city or town, but are payable solely from the special assessments (Title 11, O.S.A., Section 151).

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The bonds are bearer obligations and are payable in numerical order. The source of the fund from which the bonds are paid, to-wit: the assessments, are levied against the benefitted properties as provided in Title 11, O.S.A., Section 101. The property owner is given thirty (30) days to pay the assessment, and if not paid, same is payable in ten (10) annual installments. Title 11, O.S.A., Section 103. Said section also provides:

> "* * * Such special assessments, and each installment thereof and the interest thereon are hereby declared to be a lien against the lots and tracts of land so assessed from the date of the publication of the ordinance levying the same, co-equal with the lien of other taxes and prior and superior to all other liens against such lots or tracts of land, and such lien shall continue as to unpaid installments and interest until such assessments and interest thereon shall be fully paid * * *."

The first installment of said assessments is payable to the city clerk up to September 1 (Title 11, O.S.A., Section 105). If the installment is collected either by the city clerk or by the county treasurer, as hereinafter explained, the collecting official remits the funds to the city or town treasurer "who shall keep the same in a separate special fund for the purpose of paying the bonds and interest coupons thereon, issued against such assessments * * *" (Title 11, O.S.A., Section 105).

Assessments are payable to the city or town clerk as heretofore explained until September 1, and if not paid "it shall be the duty of the city or town clerk, promptly after the date of maturity of any such installment and

interest and on or before the fifteenth day of September in each year, to certify said installment and interest then due to the county treasurer of the county in which the city or town is located, which installment and interest shall be by said county treasurer placed upon the November delinquent tax list of the same year prepared by the treasurer of said county, and collected as other delinquent taxes are collected" (Title 11, O.S.A., Section 106).

These special assessments may be collected either by the county treasurer as hereinafter explained, or the bondholders may institute a foreclosure action (Title 11, O.S.A., Section 107), which can only be instituted after all of the ten installments are one year delinquent. *Hedges* v. *Groom*, 194 Okla. 384, 151 Pac.(2d) 936. By this method, however, the bondholder surrenders the co-equal lien inasmuch as the property must be sold subject to existing *ad valorem* taxes and other special assessments (Title 11, O.S.A., Section 107).

The provisions for the sale by the county treasurer are by a county or November sale each November (Title 68, O.S.A., Sections 381, 382 and 383), followed by a resale (Title 68, Section 432), after an intervening two-year period of redemption. The delinquent assessments after certification to the county treasurer are delinquent taxes to be collected just as *ad valorem* taxes [*Oklahoma City* v. *Vahlberg*, 185 Okla. 28, 89 Pac.(2d) 962].

These installments bear 12% penalty after delinquency.

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The quality of the *ad valorem* tax, with which the special assessment lien is co-equal, is set out in Title 68, O.S.A., Section 353, as follows:

> "Taxes upon real property are hereby made a perpetual lien * * *."

The co-equality clause is also construed in *McGrath* v. *Oklahoma City*, 156 Okla. 34, 9 Pac.(2d) 711. The constitutionality of said co-equality clause was sustained in *Board of County Commissioners of Seminole County* v. *City of Wewoka ex rel. North*, 191 Okla. 142, 127 Pac. (2d) 826. Other cases recognizing the co-equal lien of the special assessments are as follows:

Board of County Commissioners of Seminole County v. *City of Wewoka ex rel. Merten*, 191 Okla. 233, 129 Pac.(2d) 83;
Town of Medford ex rel. Fuss v. *Early*, 194 Okla. 566, 153 Pac.(2d) 633;
Service Feed Company v. *City of Ardmore*, 171 Okla. 155, 42 Pac.(2d) 853;
Boles v. *Aikman*, 157 Okla. 172, 11 Pac.(2d) 479;
Runnels v. *Citizens National Bank*, 157 Okla. 94, 11 Pac.(2d) 173;
Settles v. *Frakes*, 156 Okla. 53, 9 Pac.(2d) 768;
Criswell v. *Hart*, 155 Okla. 159, 8 Pac.(2d) 70;
Bradford v. *Schumucker*, 135 Fed.(2d) 991;
Hann v. *City of Clinton*, 131 Fed.(2d) 978.

To determine the contract received by the bondholders, we look to the laws existing at the time of the issuance of the bonds, which entered into and became a part of the contract and constitute the obligation thereof.

Nelson v. *Pitts*, 126 Okla. 191, 259 Pac. 533, 53 A.L.R. 1137;

Straughan v. *Berry* 179 Okla. 364, 65 Pac. (2d) 1203;

Davis v. *McCasland*, 182 Okla. 49, 75 Pac. (2d) 1118;

Hann v. *City of Clinton*, 131 Fed. (2d) 978, (10th Circuit), 275 Fed. 747;

Moore v. *Otis*, 275 Fed. 747;

Von Hoffman v. *Quincy*, 4 Wall. 535, 18 L. ed. 403;

Worthen Co. v. *Kavanaugh*, 79 L. ed. 638, 55 S. Ct. 555, 97 A.L.R. 905;

Louisiana ex rel. Hubert v. *New Orleans*, 215 U.S. 170, 54 L. ed. 144, 30 S. Ct. 40.

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ARGUMENT

In answering the motion to dismiss or affirm, we shall endeavor to first follow the six numerical propositions urged in the first motion to dismiss. We will then consider numerical propositions seven to ten in the supplemental motion to dismiss.

In all instances, appellees have not recited separate statements of their separate propositions, so we have endeavored to state their respective propositions in our own language, and we have then endeavored to answer appellee's propositions as we have stated them.

PROPOSITION I

The defendant in the trial court did not, in that court or in the State Supreme Court on appeal, raise the constitutional question here sought to be raised by the intervener, A. F. Reeder, and for that reason said intervener cannot now do so.

The defendant in the trial court was the County Treasurer of Washita County, Oklahoma. Said county treasurer is an administrative officer, and charged with the duty of collecting taxes. The special assessment installments involved were certified to him by the City Clerk of Cordell, Oklahoma, to "be by said county treasurer placed upon the November delinquent tax list of the same year prepared by the treasurer of said county, and collected as other delinquent taxes are collected" (Title 11, O.S.A., Section 106). The provisions for the sale of other taxes

are by a November or preliminary sale (Title 68, O.S.A., Section 383), followed by a resale after a redemption period of two years (Title 68, O.S.A., Section 432).

The county treasurer has no personal interest in the controversy and it is his duty to remit the assessments and interest collected to the city or town treasurer (Title 11, O.S.A., Section 105), who places the funds in a separate special fund for the purpose of paying the bonds and interest coupons thereon.

For the foregoing reasons, the county treasurer was not entitled to raise the constitutional question. *City of Shawnee* v. *Taylor*, 191 Okla. 687, 132 Pac.(2d) 950. Nor has he any standing to raise same in this Court. *Braxton County Court* v. *West Virginia*, 208 U.S. 192, 52 L. ed. 450, 28 S. Ct. 275; *Stewart* v. *Kansas City*, 239 U.S. 14, 60 L. ed. 120, 36 S. Ct. 15; Volume 10, Second Edition, Section 5001, *Cyclopedia of Federal Procedure.*

However, a lack of interest that may disable the county treasurer from raising a defense in a proper case would obviously not disable a person possessed of the necessary interest. Our pleading did not enlarge the issues in the case, but, as an interested party, we were in no way disabled from raising the constitutional question. The intervener in the trial court, whose assessments were payable solely from the special assessment bonds is a proper party appellant. *City of Savannah* v. *Jesup*, 106 U.S. 563, 27 L. ed. 276; *Ex parte Jordan*, 94 U.S. 248, 24 L. ed. 123; *Hassall* v. *Wilcox*, 29 L. ed. 504, 115 U.S. 598; Volume 6, *Cyclopedia of Federal Procedure*, Section 2404, Page

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511; Volume 10, Second Edition, Section 5006, *Cyclopedia of Federal Procedure*, Page 473.

PROPOSITION II

Consideration of the constitutional question herein presented was not necessary in the State Supreme Court, in order to affirm the judgment of the trial court, because the paving lien sought to be enforced by intervener, appellant herein, had been extinguished by lapse of time and laches, as provided by Oklahoma statute enacted prior to the issuance of said paving bonds and upheld by the Oklahoma Supreme Court decisions which have never been reversed or modified.

Appellee asserted not that the judgment of the State court was grounded on a non-Federal question but that same might have been decided on a non-Federal question. Of course, what might have been considered by the State Supreme Court is not determinative of the question. *International Steel and Iron Company* v. *National Surety Company* (Tenn., 1936), 56 S. Ct. 619, 297 U.S. 657, 80 L. ed. 961. The only controlling question is whether or not there was in fact drawn in question the validity of a state statute as repugnant to the United States Constitution by the highest court of a state, and that decision was in favor of its validity. *State of Indiana ex rel. Anderson* v. *Harry Brand, Trustee*, 303 U.S. 95, 82 L. ed. 685, 58 S. Ct. 443, 113 A.L.R. 1482:

> "Where a state court does not decide against a petitioner or appellant upon an independent state ground, but, deeming a Federal question to be before it, actually entertains and decides that question adversely to

> the Federal right asserted, the Supreme Court of the United States has jurisdiction to review the judgment, if it is a final judgment; and cannot refuse jurisdiction because the state court might have based its decision, consistently with the record, upon an independent and adequate non-Federal ground."

However, appellees' contention is otherwise incorrect and is prejudicial and we should like to answer it.

The appellee is now arguing that, under Section 23, Title 42, O.S. 1941:

> "A lien is extinguished by the mere lapse of time within which, under the provisions of civil procedure, an action can be brought upon the principal obligation."

Appellee argues that this statute applies to taxes and was in existence at the time of the creation of the paving bonds, and that the Supreme Court of the State of Oklahoma might have held that, under this statute, our tax liens were extinguished. Aside from the fact that such a discussion is not appropriate here and is highly speculative, such a decision by the Supreme Court of the State of Oklahoma was not only precluded by decisions prior to the *Baccus case* and subsequent thereto, as hereinafter shown, but such a decision was precluded by the court's conclusions of law in the *Baccus case*. We quote from Page 11 of the opinion of the Supreme Court of the State of Oklahoma:

> "At the time of the enactment of the 1939 Act, there was no statute of limitations applicable to the sale and resale by the county treasurer of property to satisfy street improvement liens, and at that time this Court had not decided that the general statute of limitations applied to actions to foreclose such liens. The case of *City of Bristow* v. *Groom*, 194 Okla. 384,

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151 Pac. (2d) 936, so holding, was not decided until 1944."

The Supreme Court of the State of Oklahoma did not, of course, rely on said statute but stated that the provisions of Section 242 of the 1939 Act were "consistent" with Section 23, Title 42. The court mentioned this statute again on Page 16 of its opinion as illustrative of that class of statute of limitations which extinguish both the remedy and the right. It is admitted that the court did not rely on this statute but predicated its judgment throughout on the extinguishment afforded by the 1939 Act.

However, in the case of *City of Healdton ex rel. Rewoldt* v. *Pickens*[5], No. 32,570, decided January 6, 1948, reported in Oklahoma Bar Journal, January 10, 1948, Page 10, Vol. 19, No. 1, the court specifically said:

> "Liens on lots for street paving assessments are subject to enforcement by civil actions in the district court to foreclose the liens, or by tax sale proceedings by the county treasurer in the same manner as for enforcement of liens for other taxes. Tax sale proceedings for enforcement of such liens by the county treasurer do not constitute a civil action, and the provision of 42 O.S. 1941, Section 23, that 'A lien is extinguished by the mere lapse of time within which, under the provisions of civil procedure, an action can be brought upon the principal obligation,' has no application to liens for paving assessments, and when a civil action to foreclose a paving assessment lien is barred by the general statute of limitations the lien is not thereby extinguished."

Our Court obviously could not apply this statute to paving assessments because of the provisions of 11 O.S.

[5]Pending on petition for rehearing.

1941, Section 103, making the lien of paving assessments "co-equal" with the lien of other taxes, and providing that "such lien shall continue as to unpaid installments and interest until such assessments and interest thereon shall be fully paid."

It was pointed out in the *Rewoldt case* as in previous cases that:

> "It is affirmatively declared by statute that the lien on real estate for delinquent *ad valorem* taxes does not expire by lapse of time. Such lien continues until the taxes are paid or until the real estate is sold by the county treasurer for the delinquent taxes. By Section 103, *supra*, the lien for paving assessments is given the same quality as a lien for *ad valorem* tax and such lien may be discharged in like manner as a lien for *ad valorem* tax. *Settle* v. *Frakes et al.*, 156 Okla. 53, 9 Pac. (2d) 768. It was also held in *Settle* v. *Frakes et al.*, that the failure of the county treasurer to offer for sale and sell real estate for delinquent paving assessments does not discharge the lien."

Title 42, O.S. 1941, Section 23, was part of the general lien laws, and the court had previously held in *Bailey* v. *Oklahoma City*, 157 Okla. 96, 11 Pac. (2d) 113, that the general lien laws had no application to taxes of this character.

It is true that this statute was mentioned in *Board of Education* v. *Johnston*, 189 Okla. 172, 115 Pac. (2d) 132, but this, of course, was *dictum*. In substance, the case of *Board of Education* v. *Johnston, supra*, was completely overruled by *Wilson* v. *City of Hollis*, 193 Okla. 241, 142 Pac. (2d) 633.

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PROPOSITION III

The intervener below and appellant herein did not have sufficient interest in the subject matter of the action because this Court has no way of knowing "that there was and is not sufficient funds in the city clerk's hands, collected from other lots in said district with which to pay intervener's bonds * * *."

However, this is a matter that we must presume was considered by the trial court in permitting intervention, and the trial court could not have permitted the intervention and determined that the bondholder was a proper party intervener without determining such preliminary matters. In the application to intervene, we asserted that the proceeds of the sale would be applied to the payment of our bonds, and the court specifically found, in permitting intervention, that:

> "* * * the proceeds of said sale, if conducted, will be applied to retire petitioner's bonds and therefore petitioner is vitally interested in the outcome of this litigation, and is therefore entitled to intervene."

This was, of course, the equivalent of a finding that our bonds were outstanding. Moreover, on demurrer in the lower court our bond ownership was admitted. This admission includes the inference that the bonds are outstanding and unpaid.

PROPOSITION IV

The appeal is frivolous because the question has been repeatedly decided by this Court against our contention.

In this proposition appellee asserts that:

"A lien and a statute of limitations are parts of the remedy, and not the right, and that a new statute, creating or changing a limitation, and extinguishing the lien when no action is taken to enforce the lien within the time allowed, when a reasonable time to do is given in the new statute, does not violate the obligation of any contract."

In the first place, it must be remembered that:

"Under the inhibition in the Federal Constitution as to legislation impairing the obligation of contracts, it is immaterial whether the obligation of a contract is impaired by acting on the remedy or directly upon the contract. Impairment in either case is prohibited by the Constitution. Hence, while it is now established beyond question that the remedy within certain limits may be altered or modified, according to the will of the State, even though such statutes in certain cases may have a retrospective effect and to some extent incidentally affect vested rights, the alteration cannot, however, go to the extent of impairing the obligation of the contract" 12 Am. Jur., Section 432, Page 69 (citing cases).

Thus, the law seems to be clear that remedies might be changed so long as the obligation of the contract is not impaired, but if the change of the remedy amounts to an impairment of the obligation of contract, either because the remedy is so interwoven with the contract that right and remedy are inseparable, or otherwise, the statute must fail.

In other words, the foregoing cases hold that even a remedy may not be altered or withdrawn when the right

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is affected by the alteration or change in the remedy. However, we believe that the statute here, as construed by the Oklahoma Supreme Court, does not fall within the scope of the principles permitting changes in the remedy for the following reasons:

(1) The 1939 Act here, same being subsequent Legislation, extinguishes the rights[6] as well as the remedy, and, therefore, amounts to an impairment of the obligation of contract.

(2) The provision for satisfaction of the special assessment lien by tax sale is not a remedy possessed by the bondholder, but a power in trust possessed by and exercisable only by the county treasurer for the bondholders' benefit and this is either a part of the right or connected therewith as to be incapable of separation from the right without destruction thereof.

(3) If the tax sale proceeding, however, were considered to be a remedy or the equivalent thereof, then same could not be constitutionally withdrawn without giving the bondholders a reasonable time within which to enforce their obligation. Any reasonable time given, however, would be meaningless because the law would not permit the bondholders to take any steps to collect their lien as the tax sale could be conducted only by the county treasurer.

Appellees contend that the law here is labeled or termed a limitation Act and, therefore, is purely remedial. We believe, however, that labels or names are not important and that whether or not the law professes to apply to the contract or to the remedy is unimportant if it in effect impairs the obligation of existing contracts. 12 Am. Jur., Section 432, Page 71, Notes 12 and 13.

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[6]Section 242 absolves the property of the assessment lien.

It is said in the case of *Barnitz* v. *Beverly*, 163 U.S. 118, 41 L. ed. 93, 16 S. Ct. 1042, in which the court quoted from another case:

> "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made. These are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning. When it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of another; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

And it is said in *Curran* v. *Arkansas* (U.S.), 15 How. 304, 14 L. ed. 705:

> "But it by no means follows that because a law affects only the remedy, that it does not impair the obligation of the contract. The obligation of a contract in the sense in which those words are used in the Constitution is that duty of performing it which is recognized and enforced by the law. And if the law is so changed that the means of legally enforcing this duty are materially impaired the obligation of the contract no longer remains the same."

The cases relied on by appellee referring to the reserve power to change the remedy are simply cases where the changes would not materially affect the obligation of con-

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tract, and, in some instances, were in furtherance of the public welfare.

It must remembered that, when the bonds are delivered to the paving contractor as provided in Title 11, O.S.A., Section 152, in payment of his work of street improvement, the assessment liens have been created and the bond merely consists of a funding of the property owners' obligation. The bondholders' sole "right" is the collection of these bonds and the proceedings for enforcement thereof are merely provisions for the collection of said bonds. Inasmuch as the assessment against the property has already been created and inasmuch as the assessment is the sole means of payment, the only remaining right of the bondholder is the right of collecting those assessments, and the only provisions for the collection of those assessments are by tax sale and foreclosure. Foreclosure was barred to this bondholder under the case of *Hedges* v. *Groom*, 194 Okla. 384, 151 Pac. (2d) 936, decided in 1944, although this was not known at the time of the passage of the 1939 Act, and we are not concerned with that method. We are, therefore, only concerned with the cumulative method.[7] And the only rights we are concerned with, therefore, are the rights possessed by the bondholder under this proceeding. What are these rights? They are set forth in *McGrath* v. *Oklahoma City, supra.* We quote from Page 39:

[7]This method was held to be cumulative in the case of *Service Feed Company* v. *City of Ardmore*, 171 Okla. 155, 42 Pac. (2d) 853.

> "The ultimate rights under a lien for improvements and a lien for taxes are identical. What is that right? To have the property sold by the county treasurer at public sale and thereby recover as much as possible of the amount due."

We think it elementary that a tax without the means of enforcement is a nullity. It is stated in *Woods* v. *State*, 125 Okla. 287, 250 Pac. 778, 53 A.L.R. 1128:

> "That right of the sovereign to collect taxes is necessarily included in the power of taxation."

If the 1939 Act, therefore, either extinguished our right to have the property sold at tax sale or obstructed it, it struck at the most important incident of said right. The 1939 Act did not purport to be remedial as contended by counsel, for in Section 242, it is stated:

> "The property is absolved of the lien."

In our jurisdictional statement, we demonstrated that the right to have the property sold at tax sale was not a remedy regardless of how labeled, but was merely a method of collection guaranteed us by the Act and which was possessed by the county treasurer for our benefit, as a power in trust. In other words, we merely had a right to have the county treasurer exercise the power of trust enjoined upon him. If this is withdrawn, it withdraws a right from us and not a remedy, for we possess none. Furthermore, although it purports to give us a period of time to act, this was meaningless because we could not advertise the property or conduct a tax sale, as this power was vested solely in the county treasurer.

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PROPOSITION V

The validity of the 1939 Act was preserved by the following proviso: "Provided, however, that in all cases where the period of limitation herein mentioned has expired or will expire prior to November 1, 1939, the holder of such bonds shall have until December 1, 1940, in which to pursue his remedy or obtain the benefits of this Act."

The Supreme Court stated that the bondholders were given eighteen months after the effective date of the Act within which to pursue "all such remedies." However, we have already pointed out that, under the laws existing at the time of the creation of the lien, same were collected as other taxes were collected by the county treasurer. We could not institute any proceeding directly to collect these liens except by foreclosure, which was already barred and which is not under discussion. The period given us was, therefore, meaningless to us.

It was at all times obligatory on the county treasurer to sell the property for taxes.

We have heretofore described the procedure for sale of property by the county treasurer for delinquent taxes.

Although it was at all times mandatory on the county treasurer to sell property for taxes, the 1939 Legislature, which revised the tax code, specifically provided that:

> "Any county official charged with any duty in connection with the holding of delinquent tax sales and tax resales who fails to perform such duty, shall be guilty of malfeasance in office and upon conviction thereof shall be removed from office. * * *" Title 68, O.S.A., Section 432n.

By Title 68, O.S.A., Section 432o, it was made the duty of the Attorney General of the State of Oklahoma to file proceedings for the removal of any official who "fails to make provision for the holding of such tax sales and tax resales or to hold such tax sales and tax resales as provided by law."

Thus, the bondholders had a right to assume that the laws would be followed and that the tax sales for his lien would be conducted in the same manner as for the co-equal lien of *ad valorem* taxes. This promise remained in full force and effect until the three-year period following the maturity date of the bonds, provided for in the 1939 Act, and was at all times in effect. It is urged that the three-year period, or 18 months and nineteen-day period, given was an adequate period for us to take action and that this preserved the constitutionality of this law. However, we have already pointed out that there was no action that we could take during this period, as the sole action was vested in the county treasurer. We could not advertise the property for taxes, nor could we sell the property, and that, of course, is the primary right with which we are concerned.

But it is suggested by the Supreme Court of the State of Oklahoma that an action to compel the county treasurer to do his duty would toll the statute of limitations. We must remember, however, that the primary right taken away from us is the right to have the county treasurer sell the property for taxes. It was never the obligation of the bondholders to execute the laws, as the bondholders were promised that the laws would be executed for their bene-

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fit in the same manner as for the benefit of the holders of municipal obligations payable out of general taxes.

To justify the withdrawal of the primary right, to-wit: the right to have the property sold by the county treasurer, because of the failure of the bondholders to make the county treasurer perform his duty, would be a complete shift of responsibility and alteration of the contract. The bondholders, of course, had no facilities for determining what properties were delinquent, as that information was a part of the records in the office of the county treasurer. The bonds were widely scattered and, in many cases, owned by non-residents. The only promise made by the bonds was that assessments in varying amounts had been levied against respective properties and that same would be collected in the manner provided by the laws existing at the time; that the proceeds thereof would be remitted to the city treasurer and commingled in the paving fund, from which the bondholders would be paid in the manner provided by law. Thus, the bondholders had no way of knowing which property was sold and which properties the county treasurer had failed to sell. This would require an audit of the records in the office of the county treasurer and the city clerk.

The right to have this handled in an orderly manner by the county treasurer as provided for the sale of property for other taxes was the most valuable right enjoyed by the bondholders. The bondholders, at all times, knew that if the county treasurer failed to sell assessments for one

year, he would sell for another, and the lien would not be lost by his failure to sell for one year. *City of Healdton ex rel. Rewoldt* v. *Pickens, supra.*

We must bear in mind that the "remedy" referred to by appellees is the primary "right" to have the county treasurer sell the property. If the Act is constitutional, this primary right is withdrawn from us.

The law under which the bonds were issued did not provide that "the county treasurer shall sell the property at tax sale, but if the county treasurer fails to do so, the bondholder shall compel him to conduct the tax sale." There was no secondary responsibility or obligation on the bondholder of any kind. The primary and exclusive obligation was cast on the county treasurer. Appellees claim, however, that the responsibility for the sale of the property by the county treasurer was shared by the bondholders, but this idea is negated by the terms of the laws under which the bonds were issued. The bondholders' right to institute a mandamus action[8] is simply a recourse offered by the law to any aggrieved citizen, but is not the primary right with which we are concerned. In this case, the primary right is the right to have the property sold at tax sale, and the remedy incident to that right is the

[8]If we were compelled to mandamus the county treasurer to advertise and conduct his November tax sale, were we also compelled to mandamus him to conduct his subsequent May resale? Suppose we instituted one action and did not institute the subsequent action. Suppose our action (either of them) were filed too late to have the required pre-sale publication. Do we then lose our right? Suppose the Court denied our mandamus. Inasmuch as any appeal therefrom would be moot because the time for the sale would have passed before the appeal could be presented, would we have then lost our rights? Was it our responsibility to mandamus on every possible occasion while the county treasurer lay completely dormant?

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tax sale. That is the right and the remedy with which we are concerned.

It is to be noticed that the 1939 Act itself did not require the filing of a mandamus action against the county treasurer by the bondholders. It provided that the rights of the bondholders shall be barred upon the expiration of three years, unless the holder of any such bond shall have commenced suit to foreclose his lien by filing an action for that purpose and procuring service of summons thereon or shall have evidenced his willingness to accept Street Improvement Refunding Bonds issued under the provisions of this Act, in exchange therefor, prior to the expiration of said three-year period of limitation * * * (Title 11, O.S.A., Section 242).

Thus, the bondholder had two things that he could do to the assessment liens. He could file a foreclosure action, but that was a cumulative remedy which he did not have to use. *Service Feed Company* v. *City or Ardmore*, 171 Okla. 155, 42 Pac.(2d) 853. If he filed a judicial foreclosure, he surrendered his co-equality. See nature of contract involved herein.

Furthermore, judicial foreclosure was barred by the general statute of limitations at the time this action was instituted in Washita County, Oklahoma. *Hedges* v. *Groom, supra.* The only thing left for this bondholder, therefore, under this Act was to file an agreement to accept refunding bonds, which he did not do and which he should not be compelled to do. To exchange the executed right, to-wit: his bonds, for the completely executed rights

offered under the 1939 Act would not be to afford the equivalent of what he surrendered. For a detailed consideration of this, see our jurisdictional statement where we have compared the rights given to the bondholder under the laws under which the bonds were issued and the rights offered by the 1939 Act.

We possessed no remedy to avoid the bar of the statute because that remedy was exercisable only by the county treasurer and constituted a right to us which we may term a power in trust exercisable only by the county treasurer. And which could not be withdrawn. *Von Hoffman* V. *Quincy, supra.*

What was done, no matter how it is viewed, was simply a withdrawal of the power in trust. This is no different than the case of *Von Hoffman* V. *Quincy, supra.*, and *Seibert* V. *Lewis, supra.* In the *Von Hoffman case,* the limit of the levy necessary to pay the bonds was diminished. In our case, the right to collect the tax was withdrawn. Inasmuch as a tax without a power of collection is of no value, the cases are practically identical. The only other difference is that, in our case, it was done *in futuro,* but in the meantime, we are just as helpless as we were at all times to collect our lien.

The bondholder was not charged with any of the functions of government, nor with any responsibility for their exercise.

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PROPOSITION VI

Appellees' sixth proposition is considered in our answer to other propositions and requires no further discussion here.

PROPOSITION VII

Appellees' seventh proposition set forth in their supplemental motion to dismiss appeal is merely a supplemental statement of facts and requires no further comment.

PROPOSITION VIII

The record fails to show that any Federal question involving the obligation of contracts was necessarily decided by the Oklahoma Supreme Court.

We have heretofore delineated the contract on which we rely. Appellees argue that the assessment lien is a liability created by statute. We have no quarrel with that statement, as we do not contend that the tax imposed on the property owner is a contract. The parties to the contract are the city, acting under its constitutional authority, on the one hand and the bondholders on the other hand. The general rule is stated in 43 Am. Jur., Page 276, Public Securities and Obligations, Section 9, as follows:

> "Public bonds, including the bonds issued by the various states of the Union and their political subdivisions, have been uniformly and consistently held to constitute contracts within the purview of provisions of the Federal and State Constitutions prohibiting laws impairing the obligation of contracts."

Appellees further argue that, in the event this is a contract, the obligation was "(1) that the bondholder

should receive his money when the bonds became due and (2) in the event of the failure of the property owner to pay the assessment from which the bondholder was paid that the bondholder could enforce payment by (a) tax sale and resale procedure under 11 O.S. 1941, Sec. 106, and (b) foreclosure in the district court as provided by 11 O.S. 1941, Sec. 107."

This is not correct. In the event the property owner fails to pay, the county treasurer was obliged to initiate and conduct the tax sale. The bondholder, of course, has no right to enforce payment by a sale of the property, although the assessment fund is the sole source of his payment. The assessment liens are controlled and collected by the county treasurer, and the proceeds of the collection are paid into the paving fund, which is the fund to which the bondholder looks.

PROPOSITION IX

The record fails to show that any Federal questions involving a denial of due process of law or equal protection were necessarily decided by the Supreme Court of Oklahoma.

It is our contention that the 1939 Act, as construed by the Supreme Court of the State of Oklahoma, constitutes a taking of our property without due process of law prohibited by the Fourteenth Amendment, as well as an impairment of the obligation of contract prohibited by Article 1, Section 10, of the United States Constitution.

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PROPOSITION X

The record does not present for decision any substantial Federal question for the reason that identical questions have been decided adversely to appellants' claims by the United States Supreme Court.

We have heretofore discussed the tenth proposition. We note that counsel continuously refers to Title 42, O.S. 1941, Section 23, although this was not involved in the *Baccus case.*

This statute has no reference to tax liens.[9] It is to be noticed that this statute only refers to a lien upon which an action can be brought. A sale by the county treasurer is, of course, not a judicial action or proceeding that can be brought by anybody. The Oklahoma Supreme Court had occasion to consider the statute of limitations in *Hedges* v. *Groom, supra.* In that case, they held that the general statute of limitations, to-wit: the three-year statute provided for suits upon a liability created by statute, said general statute of limitations being in existence at the time of the creation of the paving district, was applicable to a judicial foreclosure. The Court held, however, that the lien still existed, and that only a judicial foreclosure was barred. This was no more than a restatement of prior decisions. Substantially the same statement was made in this case by the Supreme Court of the State of Oklahoma, and, as we have heretofore shown, it has been made in

[9]Taxes are not debts and no action lies for their collection. In this connection see *Boeing Airplane Co.* v. *Board of County Commissioners of Sedgwick County* (Kans.), 188 Pac. (2d) 429.

numerous other cases, including the *Healdton case, supra,* decided after the *Baccus case.*

This statute does not apply to a special assessment tax any more than it does to its co-equal tax, and *ad valorem* tax. Both the lien and the duty of enforcing the lien continues in both cases, and the Legislature was powerless to extinguish the lien or obstruct the means of its enforcement.

They rely on the cases of *Wheeler* v. *Jackson,* 137 U.S. 245; *Terry* v. *Anderson,* 95 U.S. 628, 24 L. ed. 365; *Turner* v. *People of the State of New York,* 168 U.S. 89; *National Surety Company* v. *Architectural Decorating Company,* 226 U.S. 275.

We have discussed *Wheeler* v. *Jackson* in our jurisdictional statement.

The basic distinctions between the *Wheeler case* and that now before this Court are as follows:

(a) In the *Wheeler case,* the New York Legislature did not seek to put a limitation on the right of the Registrar of Arrears to sell the property for taxes as was done here under the 1939 Act.

(b) It was reasonable to compel the certificate holder to perfect a right which he had acquired under the New York Act, because the execution of this right was within his power and control; whereas, here the right to sell this property at a tax sale was controlled only by the county treasurer.

(c) It was reasonable to withdraw the right from the New York certificate holder for his failure to assert his

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right, but it is not reasonable to withdraw the rights given us to have our lien sold by the county treasurer, for his dereliction of duty.

(d) The tax sale proceeding here is not a remedy possessed by the bondholders that may be withdrawn on reasonable notice, but a power in trust possessed by the county treasurer.

(e) Here, unlike the situation in the *New York case*, the three (3) year period [or the eighteen (18 month and nineteen (19) day period] given to the bondholders under the 1939 Act was meaningless, because the bondholders had no power or authority to avoid the extinguishment of their right by taking any action to satisfy their lien.[10]

It should be noted that the third syllabus in *Wheeler* v. *Jackson* speaks of rights of a statute of limitations "in its application to an existing right of action." The statement of law presupposes a right of action to which a statute of limitations is incident.

We have also discussed *Terry* v. *Anderson* in our jurisdictional statement.

With reference to *Turner* v. *People of the State of New York*, the statute involved in this case related to land sold to the state for non-payment of taxes. It provided that tax deeds which had been on record for two years prior to the passage of the Act were vulnerable

[10]In addition to the foregoing distinctions, the 1939 Act imposed a new condition and placed a new responsibility on the bondholders, by holding that the bondholders could have avoided the statute by commencing a mandamus suit, the court in effect held that it was the bondholders' duty to compel the county treasurer to perform his statutory duty.

against attack unless assailed within six months. It applied to cases only in which the conveyance had been of record for two years. Furthermore, the plaintiff in this case had had eight years since the sale and three years since the recording of the deed during which he might have asserted his title. He had a right which the statute of limitations could operate on. It was pointed out that the courts had uniformly held that he had a remedy which the statute operated on. Here, we had no remedy upon which a statute of limitations could operate. As before pointed out, we could not make up the tax rolls, advertise the property, conduct the tax sale and execute a deed; all we could do was rely on the promise of the law that this would be done. Our primary right was to have it done, and the remedy incident to that right was the proceeding by the county treasurer.

They also rely on *National Surety Company* v. *Architectural Decorating Company*, 226 U.S. 275. This cause of action originated in Minnesota, and was a suit upon the public contractor's bond. The law in force at the time the bond was executed and delivered provided that no action could be commenced upon the bond unless within ninety days after performing the last item of work or furnishing the last item of skill, tools, machinery or material, the claimant should serve upon the principal and his surety a written notice specifying the nature and amount of his claim. An action was to be begun within one year after the cause of action accrued. The Act was later amended to provide for the presentation of the claim within

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ninety days after the completion of the contract and acceptance of the building by the proper public authorities, and the court held that this amendment did not constitute an impairment of the obligation of the contract, inasmuch as the same was simply a modification of the remedy provided in the original statute.

This case is governed not by the cases relied on by appellees but by the following cases:

Von Hoffman v. *Quincy*, 4 Wall. 535, 18 L. ed. 403;

Seibert v. *Lewis*, 122 U.S. 284, 30 L. ed. 1161;

U. S. ex rel. Wolff v. *City of New Orleans*, 103 U.S. 358, 26 L. ed. 395;

Louisiana ex rel. Hubert v. *New Orleans*, 215 U.S. 170, 54 L. ed. 144, 30 S. Ct. 40;

County Court of Ralls County v. *U. S. ex rel. Douglas*, 26 L. ed. 1220;

Louisiana ex rel. Nelson v. *Police Jury*, 28 L. ed. 574;

Rees v. *Watertown*, 19 Wall. 107, 22 L. ed. 72;

Worthen Company, Trustee v. *Kavanaugh*, 79 L. ed. 638, 55 S. Ct. 555, 97 A.L.R. 905,

all of which are cited and discussed in our jurisdictional statement.

It is important to observe that the promise made by existing laws was a lien co-equal with the lien of *ad valorem* taxes. The *ad valorem* tax lien has not been assailed, nor has the procedure for its collection been altered

or diminished in any way. It cannot be denied that to extinguish our special assessment lien and to destroy the method for its collection without in any way impairing the *ad valorem* lien is to destroy the promised co-equality.

In our "Statement of Grounds on Which Jurisdiction of Court is Invoked," we enumerated five reasons why the Federal question here was a substantial one.

With further reference to these reasons, there can be no doubt that there was drawn in question by the Supreme Court of the State of Oklahoma the validity of the 1939 Act on the ground of its being repugnant to the Constitution of the United States (Art. 1, Sec. 10, and the Fourteenth Amendment), and that this was the sole basis of the judgment of the Supreme Court of the State of Oklahoma.

With reference to Mr. Justice Gibson's dissenting opinion, there is, of course, nothing that we could say to add to this. In our judgment, it was a correct statement of the law that should have been announced by the State Supreme Court.

With reference to the case of *Hann* v. *City of Clinton*, 131 Fed. (2d) 978, decided by the United States Circuit Court of Appeals, Tenth Circuit, November 17, 1942, too much stress cannot be placed on this case in a consideration of this motion to dismiss. Surely the question can not be an insubstantial one if the United States Circuit Court of Appeals held that said 1939 Act impaired the obligation of contract of bondholders similarly situated. To argue that the question is insubstantial in the light

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of this opinion, is to treat the unanimous opinion of the Circuit Court of Appeals as frivolous. We would remind the Court that in *Hann* v. *City of Clinton*, as here, the bonds were issued under the 1923 Act, and the first question to be determined by the court was whether or not the lien had been extinguished by the 1939 Act. The action arose on a judicial foreclosure, and here it arose on a tax sale. The judicial foreclosure was the remedy afforded to the bondholder and the tax sale was the method exercised for the bondholder's benefit. These methods were described as co-equal remedies by the Oklahoma Supreme Court. The question in *Hann* v. *City of Clinton* is identical in all respects to the question before the Court here except for the detail pointed out. The constitutionality of the 1939 Act was the sole basis of the opinion of the Circuit Court of Appeals aside from the formal questions.

It must be remembered that the primary and basic question decided by the Circuit Court of Appeals, to-wit: the existence of a lien is also the primary and basic question here. This is true because both a right of judicial foreclosure and a right of tax sale obtain only in the event a lien exists.

Needless to say, the dismissal of this appeal as frivolous without a consideration of the merits would leave the law relating to special improvement bonds in a chaotic condition in this State. Let us illustrate. The 1939 Act repealed, expressly or by implication, Title 11 O.S.A., Sections 221 to 240, same being the 1927 Refunding Law.

Thus, if the 1939 Act is valid, bonds can only be refunded under the 1939 Act. This, of course, is impossible because the refunding provisions of the 1939 Act, Sections 242 to 242o were repealed by the 1947 Legislature.

If the 1939 Act is invalid, as held by the Federal Courts, bonds may still be refunded under the 1927 Law. Obviously, no bondholder will have any refunded bonds issued, no city will issue them, and no invester will purchase them until the questions are resolved.

Under *Hann* V. *City of Clinton, supra,* and the numerous cases in the lower Federal Courts following *Hann* V. *City of Clinton,* the special assessment liens are still existent. In reliance on this case, numerous declaratory judgments have been procured in all of the lower Federal Courts, holding that the liens still exist notwithstanding the attempt of the 1939 Act to absolve the property of the liens. If these liens exist, it becomes the duty of the county treasurer to sell the properties, but *Baccus* V. *Banks* has relieved the county treasurer of this responsibility. Are the Federal Court judgments binding and are the liens still existent, and is it the duty of the county treasurer to sell the property in reliance on the declaratory judgments rendered in the Federal Courts in the particular paving districts involved? These questions cannot be answered until resolved by the United States Supreme Court.

In reliance on *Hann* V. *City of Clinton, supra,* petitions have been filed for the composition of indebtedness of unincorporated special assessment districts, under Title 11, U.S.C.A., Sections 401, *et seq.* Final decrees of con-

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firmation have been entered decreeing that the liens are valid and subsisting. Are these decrees binding? This question cannot be answered until resolved by the Supreme Court of the United States.

We believe that we have clearly distinguished this case from the authorities relied on by appellees. The cases on which we rely have been heretofore cited and are definitely controlling of this question.

CONCLUSION

For the foregoing and other reasons, we respectfully pray that said motion to dismiss or affirm be denied, and that judgment be rendered reversing the judgment of the Supreme Court of the State of Oklahoma.

Respectfully submitted,

LOCKWOOD JONES,
Cordell, Oklahoma;

ARNOLD T. FLEIG,
917 Perrine Building,
Oklahoma City, Oklahoma;

W. R. BANKER,
Manhattan Building,
Muskogee, Oklahoma;

SOLON W. SMITH,
Tradesmens Nat'l. Bank Bldg.,
Oklahoma City, Oklahoma,
Attorneys for Appellant.

FEBRUARY, 1948.

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APPENDIX

TITLE OF ACT:

"An Act fixing limitations upon the time in which the lien of 'street improvement bonds' issued under authority of Chapter 10, Article 12, Oklahoma revised laws of 1910 and of 'street improvement bonds' or of 'refunding street improvement bonds' issued under authority contained in Chapter 33, Article 14, Oklahoma statutes of 1931, and statutes supplementary and amendatory thereto, may be enforced by court action or otherwise; providing a method for refunding said bonds and making it the mandatory duty of the governing boards of cities and towns and of the clerks and treasurers of cities and towns to do certain things in connection therewith; providing for the designation, terms, place of payment, rate of interest, execution, and other details of the refunding bonds and that said bonds or the coupons attached may be used as cash in the payment of special assessment obligations against which said refunding bonds are issued; providing for reassessment of property liable for the bonds after notice has been given and protest period has elapsed and fixing the rate of interest on said reassessments; providing for the collection of reassessment installments, the disposition thereof, and for penalties in event of delinquency; making the refunding bonds a lien co-equal with that of other taxes; providing for foreclosure of the lien of said bonds in certain cases; prescribing rules for construction of this Act; and declaring an emergency" Laws 1939, P. 156.

§242. LIMITATION OF ACTIONS ON "STREET IMPROVEMENT BONDS" OR "REFUNDING STREET IMPROVEMENT BONDS"—HOLDER MAY ACCEPT NEW REFUNDING BONDS:

"From and after the effective date of this Act, the right of any holder to enforce the lien of any 'Street Improvement Bond' issued under authority of Chapter 10, Article 12, Oklahoma Revised Laws of 1910, or of any 'Street Improvement Bond' or 'Refunding Street Improvement Bond' issued under any authority

contained in Chapter 33, Article 14, Oklahoma Statutes of 1931, and statutes supplementary and amendatory thereto, by foreclosure, mandamus, refunding, or otherwise, shall be barred upon the expiration of three years immediately following the maturity date named in the face of such bond, unless the holder of any such bond shall have commenced suit to foreclose his lien by filing an action for that purpose and procuring service of summons therein or shall have evidenced his willingness to accept Street Improvement Refunding Bonds issued under the provisions of this Act, in exchange therefor, prior to the expiration of said three year period of limitation; Provided, however, that in all cases where the period of limitation herein mentioned has expired or will expire prior to November 1, 1939, the holder of such bonds shall have until December 1, 1940, in which to pursue his remedy or obtain the benefits of this Act. The running of the period of limitation herein fixed shall be an absolute bar to any action or proceeding brought thereafter, whether the same is plead as a defense or not, and the property against which such bonds theretofore represented a lien shall thereafter be, by operation of law, absolved of any lien or liability on account of said bonds.

"It shall the mandatory duty of the city clerk to notify the holders of all outstanding Street Improvement Bonds that the same are about to be barred by the Statute of Limitations, by mailing to the holder of each such bond at his last known address, as shown by the records of said city clerk, and by publication of notice in some newspaper of general circulation in the city or town in which such Street Improvement District is located, and if there be no newspaper published in said city or town, then the publication shall be made in some newspaper published in said county, and by publication thereof in at least one nationally recognized financial journal, which notices shall be mailed and published at least sixty days prior to the expiration of such Statute of Limitation; said notices shall be substantially in the following form:

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" 'NOTICE

" 'To all holders of Street Improvement Bonds of District No. ..... (or, if appropriate, insert the ordinance or serial No.) of the City of ....., Oklahoma:

" 'You are hereby notified that on the .....day of....., 19....., the above bonds and rights thereunder will be barred by Statute of Limitation, as provided in Senate Bill 164, Oklahoma Session Laws, 1939. You will govern yourselves accordingly.

.....

City Clerk of City of ....., Okla.'

"Failure of the city clerk to give the notice provided herein shall not impair any of the provisions of this Act. Laws 1939, P. 156, §1."

§242a. HOLDER OF BONDS MAY FILE AGREEMENT TO ACCEPT STREET IMPROVEMENT REFUNDING BONDS:

"The holder of any 'Street Improvement Bond' issued under authority of Chapter 10, Article 12, Oklahoma Revised Laws of 1910, or of any 'Street Improvement Bond' of 'Refunding Street Improvement Bond' issued under any authority contained in Chapter 33, Article 14, Oklahoma Statutes of 1931, and statutes supplementary and amendatory thereto, may at any time after the maturity date stated on the face of such bonds and before the running of the period of limitation mentioned in Section 1 hereof, file with the city or town clerk of the city or town in which lies the paving district against which his bond is issued, an 'Agreement to Accept Street Improvement Refunding Bonds.' Said instrument shall contain a description of the bond with reference to which it is made, showing at least the amount, the date of issue, date of maturity, amount of delinquent interest, the paving district against which it is a lien and shall recite that the person signing said instrument is the owner or holder of the bond described and is vested with legal authority to execute an agreement to accept, and does thereby agree to accept, Street Improvement Refunding

Bonds issued under authority of this Act. Said 'agreement' shall also contain a statement that the owner of the bond or bonds described therein agrees to advance his proportionate share of the cost of such refunding procedure. It shall also contain a request that the governing board of the city or town be notified of the filing of said instrument and that said governing board proceed to refund the bond or bonds described therein in accordance with the provisions of this Act. Said instrument shall not be eligible for filing with the city or town clerk as herein provided unless the maker thereof shall append thereto, his affidavit that all of the statements made therein are true and correct. It shall be the mandatory duty of the city or town clerk to accept said instrument when the same is tendered to him and to file the same in a safe and appropriate place in his office. It shall also be the duty of said clerk to convey the fact of said filing, and the information contained therein, to the governing board of said city or town at its next regular or special meeting. The filing of said instrument shall constitute 'Evidence of Willingness to Accept Street Improvement Refunding Bonds' such as will stop the running of the period of limitation mentioned in Section 1 hereof but said filing shall also limit the owner of the bond or bonds described in the instrument filed to any remedy other than that made available by this Act, whether the remedy be sought before or after said period of limitation has expired. Laws 1939, P. 157, §2."

§242b. GOVERNING BODY TO REFUND CERTAIN STREET IMPROVEMENT BONDS AND STREET IMPROVEMENT REFUNDING BONDS:

"It shall be the mandatory duty of the governing board of any city or incorporated town, whether governed by special charter or otherwise, to proceed to refund any and all 'Street Improvement Bonds' issued under authority of Chapter 10, Article 12, Oklahoma Revised Laws of 1910, and any and all Street Improvement Bonds or 'Refunding Street Improvement Bonds' issued under any authority contained in Chap-

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ter 33, Article 14, Oklahoma Statutes of 1931, and statutes supplementary and amendatory thereto, and the interest due thereon, with respect to whch the owners or holders thereof have filed an 'Agreement to Accept Street Improvement Refunding Bonds' as provided in Section 2 of this Act. Said refunding procedure shall not, however, be commenced until the bond or bonds sought to be refunded shall have been matured and past due for at least three years, but shall be commenced within six months after the expiration of said three year period. Said refunding procedure, after commencement, shall be promptly carried out in accordance with the provisions of this Act. In the event that a party or parties own all the outstanding bonds in a Street Improvement District, and have filed an 'Agreement to Accept Street Improvement Refunding Bonds,' as provided in this Act, such party or parties may file an application with the Governing Board of such city or town, for Street Improvement Refunding Bonds, as provided in this Act, prior to the expiration of the three year period, and in such event said proceedings for refund shall be commenced within six months after the filing of such application. Laws 1939, P. 158, §3."

§242c. DUTIES OF GOVERNING BOARD AND CLERK:

"During the time provided in Section 3 hereof for the commencement of refunding proceedings, the governing board of any city or town shall require from the clerk thereof a written statement showing the total amount of the bonds of any street improvement district with respect to which the owners or holders thereof have filed 'Agreement to Accept Street Improvement Refunding Bonds.' Said statement shall also contain a description of each piece of property in the special assessment district, against which assessments remain due and unpaid and said statement shall show the amount of each unpaid assessment outstanding against each piece of property and the year in which the same came due, together with the amount of interest and penalty due thereon. Said governing board shall examine said statements and if the same are found

to be true and correct, it shall enact a resolution declaring the amount of indebtedness due by reason of the total outstanding and unpaid bonds and interest against said special assessment district and that the total amount thereof shall be declared to be the basis of a reassessment against the property liable therefor to pay Street Improvement Refunding Bonds about to be issued under authority of this Act. Said resolution shall recite by number and date of passage the ordinance theretofore enacted levying assessments to pay the bonds about to be refunded, shall describe said obligations about to be refunded and declare the determination of such governing body to cause said bonds to be refunded and to levy reassessments in the amount necessary to pay said bonds and the interest accrued thereon, against the several lots, pieces and parcels of land liable for the cost of the improvement. Said resolution shall likewise recite that a full and complete statement, duly approved, showing the amount of outstanding bonds and interest thereon, together with the delinquent assessments and penalties and likewise showing the property liable for assessment to pay the same and the extent to which each such piece of property is so liable is on file in the office of the city or town clerk. The assessment levied under authority of this Act against any lot or piece or parcel of land shall not exceed the proportionate part of the Street Improvement Refunding Bonds for which that lot or piece or parcel of land is liable before the passage of this Act. Said resolution shall also recite that any person, firm or corporation interested or liable shall have the right to file a written protest against the amount shown by the statement in the office of the city or town clerk to be due against any piece of property in which such protestant is interested; provided said protest be filed within fifteen days from the date of the first publication of said resolution, and that failure to file said protest within the time stated shall be deemed to be a waiver of any right such person, firm or corporation may have had or claimed that might have been made the basis of a protest. Said resolution shall be published in a newspaper printed in the county

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and having a general circulation in the city or town and must be published in two successive issues of a weekly newspaper or in two successive Thursday issues of a daily newspaper. Laws 1939, P. 159, §4."

§242d. NOTICE TO BONDHOLDERS AND THOSE PROTESTING:

"After the time for filing protest has passed, the governing board shall cause the city or town clerk to mail a written notice to all persons, firms or corporations who have filed written protests, and to all bondholders of bonds against the special assessment district who have filed 'Agreements to Accept Street Improvement Refunding Bonds' advising as to the date, time and place, when and where the governing board of said city or town will hear protestants' objections orally. If at said hearing it is established that the statements of the amount of bonds outstanding, the property liable for assessments against the same are in error, the governing board shall correct the same accordingly. Laws 1939, P. 160, §5."

§242e. HEARING—ORDINANCE:

"After the governing board of any city or town has heard all protests and the amount of assessments and penalties due from each piece of property in the special assessment district has been definitely determined and confirmed said board shall scale down the total special assessment obligation for which each lot, piece or parcel of real estate was liable before refunding so as to determine the amount for which each such piece of property should be reassessed in order to raise its proportionate part of the revenue necessary to retire an amount of 'Street Improvement Refunding Bonds' equal to the total amount represented by the 'Agreements to Accept Street Improvement Refunding Bonds' that have been filed, plus accrued interest, said governing board shall then enact an ordinance describing each piece of property in the special assessment district liable for special assessments and state the total amount of assessments and penalties for which each piece so described is liable as reapportioned and said ordinance

shall also declare that the amounts set opposite each such description are thereby reassessed against said properties and that said ordinance shall constitute the levying authority whereby said amounts named shall be payable in ten equal annual installments and shall bear interest at the rate of seven (7%) per cent per annum until paid. Said ordinance shall also recite that unless said amounts are paid within thirty (30) days from the date of publication of said ordinance, said levies shall thereafter be payable only in accordance with the provisions of this Act and that the owners of the property so named shall have the privilege of paying all of the amounts set opposite the description of their property, without interest, within thirty (30) days from the date of the publication of said ordinance and thereby relieve said property of any lien or obligation arising out of the improvements constituting the basis of said assessments. Said ordinance shall be published once in some newspaper printed in the County and having a general circulation in said city or town. Such special assessments and each installment thereof and the interest thereon are hereby declared to be a lien against the lots or tracts so assessed from the date of the publication of said ordinance and said lien shall be co-equal with the lien of other taxes and shall be prior and superior to all other liens against such lots or tracts and such liens shall continue as to unpaid installments and interest until such assessments and interest thereon shall be fully paid, but unmatured installments shall not be deemed to be within the terms of any general covenant of warranty. Laws 1939, P. 160, §6."

§242f. "ASSESSMENT RECORD OF STREET IMPROVEMENT REFUNDING BONDS" BOOK, ENTRIES IN:

"As soon as the assessing ordinance is adopted, the city or town clerk shall prepare a book which shall be known as the 'Assessment Record of Street Improvement Refunding Bonds' in which he shall enter a description of each lot, tract or subdivision or real estate to be assessed in accordance with the provisions of said ordinance, setting out the amount of each assessment

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and leaving a space for entering the name of the owner of each such lot, tract or subdivision and a blank space for entering the payments which may be made from time to time on account of such assessment. Laws 1939, P. 161, §7."

§242g. FIRST INSTALLMENT OF ASSESSMENTS DUE WHEN—PAYMENT OF ASSESSMENTS AND INTEREST:

"The first installment of said assessments, together with interest upon the whole thereof from the date of the passage of the assessing ordinance to the first of the next following September, shall be due and payable on or before the first day of September next succeeding the passage of the ordinance; provided, however, if such assessing ordinance is not passed prior to the first day of August in any year, the first installment of such assessment shall be due and payable with interest from the date of the passage of such assessing ordinance to the first day of September of the following year. In case any installment or interest is not paid when due, the installment so matured and unpaid and the unpaid interest thereon shall draw interest at the rate of twelve per cent (12%) per annum from maturity until paid, except as hereinafter otherwise provided. All assessments and interest shall be paid to the city or town clerk, who shall deliver same to the city or town treasurer who shall keep the same in a separate special fund for the purpose of paying the bonds and interest coupons thereon issued against such assessments, and after the payment of all bonds that have been issued against the special assessment district, and the interest thereon, and any surplus remaining in said fund shall be paid into the general revenues of said city or town. Laws 1939, P. 161, §8."

§242h. ISSUANCE OF NEGOTIABLE COUPON BONDS —RESOLUTION—RECITALS OF BONDS—REGISTRATION:

"Immediately after the expiration of thirty (30) days from the publication of the assessing ordinance, within which period the whole of any assessment may be paid without interest, the governing body of such city or town shall provide by resolution for the issu-

ance of negotiable coupon bonds in the aggregate amount of such assessments then remaining unpaid, bearing date of thirty (30) days after the publication of the ordinance levying the assessments and in denominations of one-hundred ($100.00) dollars or as said governing body finds to be convenient in effectuating an exchange with the holders of the bonds being refunded, which bonds shall in no event be or become a liability of the city or town issuing the same. The bonds herein provided for shall recite that they are negotiable under the laws of Oklahoma and that they are payable at the expiration of eleven (11) years from their date, subject to partial pro rata payments on the principal with proportionate reduction of interest coupons in accordance with any such payments; and that in addition to other recitals each coupon shall provide that it is subject to reduction in accordance with any payments made on the principal of the bond to which it is attached.

"Said bonds shall be made to bear interest at the rate of six (6%) per cent per annum from their date until paid, payable on the first day of September of each year, beginning on the second September following the date of said bonds. Said bonds shall be designated 'Street Improvement Refunding Bonds' and shall recite that they are issued in pursuance of this Act for the purpose of refunding outstanding bonds against the special assessment district described therein by naming the street or streets, or parts thereof, or other public place, with respect to which the original bonds were issued, and that they are payable from the reassessments which have been levied upon the lots, tracts or subdivisions of land benefitted by said improvement and from the accumulation of the interest and penalty provided by law; said bonds shall further recite the number of the ordinance and date of its passage by which reassessments therefor have been levied; said bonds shall further recite that they may be used in the payment of any special assessment installment against which they are issued or the interest or penalties accumulated thereon and that the matured interest coupons attached thereto may be used likewise, but that

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in no event shall said bonds or coupons be credited against any such special assessment installment or the interest or penalty accumulated thereon, except at par value; each of said bonds shall further recite that it is a part of an issue aggregating (state the amount) the total special improvement obligation of the district against which it is issued and that no bond of said issue shall enjoy priority of payment over any other bond of said issue, notwithstanding the numerical designation of any bond. Said bonds shall be signed by the mayor of said city or the president of the board of trustees of such town and shall be attested by the city or town clerk, and shall have the impression of the corporate seal of the city or town thereon, and shall have interest coupons attached thereto, maturing in accordance with the tenor of said bonds, bearing facsimile signatures of the mayor and city clerk or president of the board of trustees and town clerk, as the case may be; said bonds and interest coupons shall recite that they are payable at the office of the city or town treasurer. Said bonds shall be numbered consecutively beginning with number one(1), but said numerical designation shall not constitute any priority as to payment of any bond over the other. Each such bond shall be registered by the clerk and treasurer of such city or town in books to be provided for that purpose and each such bond shall bear an endorsement executed by the clerk and treasurer of such city or town certifying that said bonds have been so registered. Neither said bonds nor coupons shall be so issued as to be subject to call or redemption in cash before the date of maturity stated thereon. Laws 1939, P. 162, §9."

§242i. USE OF REFUNDING BONDS TO PAY INSTALLMENT OF SPECIAL ASSESSMENTS OR INTEREST:

"Any of said Street Improvement Refunding Bonds and matured coupons may be used the same as cash in the payment of any or all matured or unmatured installments of special assessments or any part of any such installment, levied against any property within the special assessment district for which said bonds

and coupons are issued, or in payment of any interest or penalty that has accrued upon any such installments, and when so used it shall be the duty of the city or town clerk accepting such payment to credit the lot, tract or parcel of land for which such payment is made, with credit equal to the face amount of bonds and matured coupons tendered to him, charging off the oldest special assessment obligations and interest accrued, provided however, it shall be unlawful for any city or town clerk or treasurer in accepting any such bond or matured coupon, to credit only a part thereof on any assessment obligation and return any cash, voucher or warrant to the person, firm or corporation tendering the same, and provided further that no such bond shall be accepted as cash in payment of a special assessment obligation unless all of the unmatured coupons are attached thereto. Any bond or matured coupon so tendered must be entirely credited against some outstanding assessment obligation or otherwise they may not be used at all for that purpose, but no credit shall be given for the unmatured coupon attached to any such bonds. Whenever any such Street Improvement Refunding Bond or Coupon shall have been paid by the city or town treasurer, or shall have been received in connection with the payment of any outstanding special assessment obligation as provided for in this Section, whether matured or not, it shall be the duty of the city or town treasurer receiving the same to mark each such bond or coupon 'Paid' in red ink or with a punch bearing said word, and thereafter to keep the same in a place of safekeeping. Laws 1939, P. 163, §10."

§242j. CASH PAYMENT—DELIVERY OF REFUNDING BONDS TO HOLDERS PAR FOR PAR WHEN—ADJUSTMENT IF DIFFERENCES—CANCELLATION OF ORIGINAL BONDS:

"All cash payments made within said period of thirty (30) days following the date of the publication of the ordinance levying such assessments, shall be paid to the city or town treasurer who shall place the same in a separate special fund. Such Street Improvement Refunding Bonds in such amount as shall represent the

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unpaid assessments as provided for in this Act, shall be delivered to the holder or holders of such original bond or bonds and accrued interest and coupons in exchange for such original bond or bonds and accrued interest and coupons at a rate of par for par and if, due to payments made during the thirty (30) days period herein mentioned, there are fewer Special Assessment Refunding Bonds issued than are necessary to effectuate a par for par exchange, the difference shall be adjusted out of the cash receipts placed in said special fund during said thirty (30) day period. In event any such cash adjustments are necessary, each holder of the obligations being refunded shall participate proratably in the available cash. All the original bonds and coupons so received in said exchange shall be cancelled and a record of such cancellation so made upon the bond register of such city or town. Laws 1939, P. 164, §11."

§242k. ASSESSMENTS PAYABLE WHEN — ACCOUNT OF COLLECTIONS—USE OF FUND—PRE-PAYMENT OF BONDS:

"The assessments provided for and levied under the provisions of this Act shall be payable as the several installments become due, together with interest thereon, to the clerk of such city or town, who shall give proper receipt for such payments, and credit the same upon the 'Assessment Record of Street Improvement Refunding Bonds.' It shall be the duty of the city or town clerk to keep an accurante account of all such collections made by him, and to pay to the city or town treasurer daily the amounts of such assessments collected by him in cash, and the amounts so collected and paid to the city or town treasurer shall constitute a separate, special fund to be used and applied to the payment of such bonds and the interest thereon as follows: such fund shall first be used to the payment of the matured interest coupons due on such bonds and after the payment thereof the balance in such special fund to be applied on the principal of the outstanding bonds; provided that no pre-payment on the principal of such bonds shall be made unless there is

on hand in such fund after the payment of matured interest coupons, a sum equal to or greater than ten per cent of the principal of said outstanding bonds; and provided further that the remaining interest coupons on said bonds, shall be reduced in proportion to the amount of such payments. Such bonds and coupons as are received by the city or town clerk in payment of such special assessment obligations shall be delivered daily to the treasurer of said city or town, the same as cash and upon receipt of said bonds or coupons by said treasurer, and at the time the same are by said treasurer marked 'Paid' as in this Act provided, said treasurer shall cause his bond register to recite the date and manner by which said bonds or coupons were retired. Laws 1939, P. 164, §12."

§2421. DELINQUENT INSTALLMENTS OF REASSESSMENTS—ACTION TO FORECLOSE LIEN:

"In any installment of reassessment levied under the provisions of this Act providing for the payment of said Street Improvement Refunding Bonds shall have been delinquent for a period of at least twelve (12) months, the holder of any bond issued under the provisions of this Act, retirement of which cannot be had by reason of insufficient money being on hand in the special fund provided for the retirement thereof, shall have the right to institute, in the name of the city or town, issuing such bond, an action in the District Court of the County in which said property is located to foreclose the lien of such assessment, stating in said petition generally the ownership of such bond or coupon, the facts concerning the delinquency in payment of the same, describing the property assessed, the nature of the improvement, the amount of the unpaid delinquent reassessment and interest and penalty due thereon and praying for the foreclosure of such lien. Upon the filing of such suit all unmatured installments of assessments shall become due and payable and the lien of such assessments foreclosed in such action. Summons shall be issued on such petition as in other civil actions and the cause tried by said District Court. Judgment may be entered thereon for the amount of all reassess-

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ments levied, both matured and unmatured, together with interest and penalty due on such installments as have become delinquent and said judgment shall bear interest at the rate of six (6%) per cent per annum from the time of the institution of such action until said judgment is paid. In event said judgment, together with interest and cost, is not paid within thirty (30) days after the date of rendition thereof, an order of sale shall issue by the clerk of said court, directed to the sheriff of the county, to sell said real estate in the manner and form provided for the sale of real estate without appraisement. Such judgment shall carry the cost of such action together with the cost of such sale; and upon the payment of such judgment, the amount received shall be paid to the clerk of said court who shall pay over all of the money received except that part representing the costs of said case to the city or town treasurer who shall then credit the same to the separate special fund provided for the payment of such outstanding Street Improvement Refunding Bonds and interest thereon. Such judgment shall not be paid except in lawful money of the United States of America, but nothing herein shall be construed to prevent the dismissal of such foreclosure action at any time prior to judgment upon payment of the total delinquent reassessments, interest and penalty for which the property sought to be foreclosed is liable, in bonds or coupons as provided in this Act, and the payment of the costs accrued in said action to the date of such dismissal. The judgment mentioned herein shall provide for the sale of said real estate subject to existing general and *ad valorem* taxes and subject to any special assessments not foreclosed in said action. All owners or encumbrancers shall be made parties defendant in such suit. Laws 1939, P. 165, §13."

§242m. SUITS TO SET ASIDE ASSESSMENT OR FOR INJUNCTION—CORRECTIVE ASSESSMENT:

"No suit shall be sustained to set aside any assessment or to enjoin the governing body of any city or town from levying or collecting any such assessment, or installment thereof or interest or penalty thereon,

or issuing the bonds or providing for their payment or contesting the validity thereof on any ground, or for any reason, other than for the failure of such governing body to adopt and publish the resolutions and ordinances provided for in this Act, unless such suit shall be commenced within fifteen (15) days after the publication of the ordinance levying reassessments; and provided, however, that in the event any special reassessment shall be found to be invalid or insufficient in whole or in part, for any reason whatever, the governing body may at any time in the manner provided for in this Act, proceed to cause a new and corrective assessment to be made and levied which shall have the same force and effect as if the same had been properly made in the beginning. Laws 1939, P. 166, §14."

§242n. VOID ASSESSMENTS OR OBLIGATIONS NOT AFFECTED BY ACT:

"This Act shall not be construed to validate any void assessment heretofore made or any improvement bonds heretofore issued; nor shall any proceedings hereunder operate to make binding upon any property owner any previous invalid obligation but every defense available against the original assessment shall be preserved to and be available against any issue of refunding bonds issued hereunder. Laws 1939, P. 166. §15."

§242o. CONSTRUCTION IN ENTIRETY—ENTIRE ACT VOID IF PART IS VOID:

"It is hereby declared to be the intention of the Legislature, in the enactment of this Act, that it be construed in its entirety; and that, if any part thereof is unconstitutional and void, the entire Act shall be void. Laws 1939, P. 166, §16."

(The foregoing is found in the 1939 Session Laws as Chapter 33, Article 5, Sections 1 to 16, inclusive, and is described in Oklahoma Statutes Annotated as Sections 242 to 242o, inclusive, Title 11.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 618

A. F. REEDER,

Appellant,

vs.

W. F. BANKS AND ERNEST MORRIS, COUNTY TREASURER OF WASHITA COUNTY, OKLAHOMA

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATEMENT OPPOSING JURISDICTION, SUPPLEMENTAL STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

A. J. WELCH,
MILTON KEEN,
JAMES F. HANING,
MALCOLM ROSSER,
RICHARD S. MARTIN,
GILBERT H. BOND,
Counsel for Appellees.

INDEX

Subject Index

	Page
Statement opposing jurisdiction and motion to dismiss or affirm	1
Supplemental statement opposing jurisdiction	11
Statement of facts	11
The record fails to show that any Federal question involving the obligation of contracts was necessarily decided by the Oklahoma Supreme Court	15
The record fails to show that any Federal questions involving a denial of due process of law or equal protection were necessarily decided by the Supreme Court of Oklahoma	19
The record does not present for decision any substantial Federal question for the reason that identical questions have been decided adversely to appellant's claims by the United States Supreme Court	19
Conclusion	24
Motion to dismiss or affirm	27

Table of Cases Cited

Adams v. *Kenoyer*, 116 N. W. 98	5
Anderson v. *Luckett*, 321 U. S. 233, 88 L. Ed. 692, 151 A.L.R. 824	4
Atchafalya Co. v. *Williams*, 258 U. S. 190, 66 L. Ed. 559	4
Bangor v. *Goding*, 56 Am. Dec. 688	5
Benton Turner v. *People of the State of New York*, 168 U. S. 89	22
Bertram v. *Moore*, 160 Okla. 78, 15 Pac. (2d) 589	20
Best v. *Baumgartner*, 1 L.R.A. 356	5
Board of Education v. *Johnson*, 189 Okla. 172	2
Bristow v. *Groom*, 194 Okla. 384, 151 P. (2d) 936	16
Campbell v. *Hold*, 29 L. Ed. 483	4
Campbell v. *Olney*, 262 U. S. 352	19

Page

Case v. *Penick*, 186 Okla. 217 10
City of Bristow v. *Groom*, 194 Okla. 384 9
City of Chickasha v. *O'Brien*, 58 Okla. 46 ..... 9, 16
City of Healdton v. *Pickins* (decided by the Oklahoma Supreme Court January 6, 1948) 9
City of Shawnee v. *Taylor*, 132 Pac. (2d) 950 3
Coakley v. *Phelan*, 179 Okla. 515, 66 Pac. (2d) 19 20
Detroit United R. Co. v. *Michigan*, 242 U. S. 238 15
Erie R. Co. v. *Tompkins*, 304 U. S. 64 19
Eustis v. *Bolles*, 150 U. S. 361 18
Georgia R. & Power Co. v. *Decatur*, 262 U. S. 432 15
German v. *Myers*, 80 Pac. (2d) 624 3
Gilbert v. *Acreman*, 53 N. E. 753 7
Gray v. *Deal*, 50 Okla. 94, 151 Pac. 205 20
Hale v. *Iowa State Board of Assessment*, 302 U. S. 95 17
Hann v. *City of Clinton* 16
Haynes v. *Wadey*, 41 N. W. 322 5
Home Building v. *Blaisdell*, 290 U. S. 398, 78 L. Ed. 413, 88 A.L. R. 1481 ..... 4, 5
Honeyman v. *Jacobs*, 306 U. S. 532, 83 L. Ed. 972 4
Jones v. *Coal Creek Mining & Mfg. Co.*, 180 S. W. 179 5
Lamb v. *Powder River*, 132 Fed. 434 5
Land Co. v. *Williams*, 66 L. Ed. 559 ..... 4, 6
Larson v. *South Dakota*, 278 U. S. 429 17
Melborn v. *Kelley*, 145 Pac. 816 5
Meyer v. *City of Eufaula*, 132 F. (2d) 648, 154 F. (2d) 943 ..... 2, 4, 5
Mitchell v. *Clark*, 28 L. Ed. 279 4
Mulvey v. *City of Boston*, 83 N. E. 402 5
National Surety Co. v. *Architectural Decorating Co.*, 226 U. S. 275 22
Phelps v. *Board of Education*, 300 U. S. 319 17
Pierce v. *Somerset Railway*, 171 U. S. 641 18
Richmond Mfg. Co. v. *Wachovia Bank*, 300 U. S. 124, 81 L. Ed. 552, 108 A.L.R. 886 ..... 4, 8
Shinn v. *Oklahoma City*, 184 Okla. 236 3
Siebert v. *U. S.*, 122 U. S. 284, 30 L. Ed. 1161 4
Terry v. *Anderson*, 95 U. S. 628, 24 L. Ed. 365 ..... 4, 23
Tipton v. *Smythe*, 8 An. Cas. 521 5

Page

Town v. *Burton*, 26 L. Ed. 886 4
Town of Shattuck v. *Barcarfer*, 137 Pac. (2d) 238 10
United States v. *Moreeno*, 245 U. S. 392, 62 L. Ed. 359 4
Versluis v. *Town of Haskell*, 154 F. (2d) 935 ..... 4, 16
Wheeler v. *Jackson*, 137 U. S. 245, 34 L. Ed. 659 ..... 4, 21
Wood v. *Lovett*, 313 U. S. 362, 85 L. Ed. 1404 4
Woodbury v. *Grimes*, 1 Colo. 100 5
Wooster v. *Bateman*, 102 N. W. 521 5

STATUTES CITED

American Jurisprudence:
Volume 12, page 86 ..... 5, 8
Volume 34, page 19 5
Volume 34, page 27 21
Volume 48, page 745 21
Corpus Juris, Volume 12, page 1057 5
Cyclopedia, Volume 8, page 1005 5
Oklahoma Statutes, 1941:
Volume 11, Section 103, et seq. 17
Volume 11, Section 242 ..... 14, 17, 18, 19, 20, 21
Volume 12, Section 95(2) 16
Volume 42, Section 23 ..... 19, 20, 21
Ruling Case Law:
Volume 6, page 367 ..... 5, 7
Volume 17, page 680 5
Volume 20, page 690 1
Senate Bill No. 164 of the Oklahoma Legislature 6

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 618

A. F. REEDER, ETC., ET AL.,

Appellant,

vs.

W. F. BANKS, ET AL.,

Appellees

APPELLEE'S STATEMENT OPPOSING JURISDICTION, AND MOTION TO DISMISS APPEAL, OR AFFIRM STATE COURT OPINION.

Comes now the appellee, W. F. Banks, and makes the following statement opposing jurisdiction of the U. S. Supreme Court on this appeal, and moves the Court to dismiss this appeal for want of jurisdiction, and if that be not the proper order, that the opinion of the State Court be affirmed, for the following reasons:

1. The defendant in the trial court did not, in that court or in the State Supreme Court on appeal, raise the constitutional question here sought to be raised by the intervener, A. F. Reeder, and for that reason said intervener cannot now do so. 20 R. C. L. 690-692.

2. Consideration of the constitutional question herein presented was not necessary in the State Supreme Court, in order to affirm the judgment of the trial court, because the paving lien sought to be enforced by intervener, appellant herein, had been extinguished by lapse of time and laches, as provided by Oklahoma Statute enacted prior to the issuance of said paving bonds and upheld by the Oklahoma Supreme Court decisions which have never been reversed or modified. *Board of Education* v. *Johnson*, 189 Okla. 172, cited and approved by C. C. A. in *Meyer* v. *City of Eufaula* (Okla.) 154 Fed. (2d) 943, and quoted in the opinion from which this appeal is taken (R. ——). In that opinion the Oklahoma Supreme Court, up-holding the limitation statute herein complained of, said (R. ——), referring to the 1939 law:

> "That provision was consistent with 42 O. S. 1941, Sec. 23, which provides: 'A lien is extinguished by the mere lapse of the time within which, under the provisions of civil procedure, an action can be brought upon the principal obligation'."

And in construing the above quoted statute the Supreme Court had already said in *Board of Education* v. *Johnson*, 189 Okla. 172:

> "And it (the paving lien) is extinguished by the lapse of time within which, under the provision of civil procedure an action, or the equivalent of an action, can be brought to liquidate the obligation."

3. Appellant's Petition of Intervention does not even state a cause of action, and that fact deprives the U. S. Supreme Court of jurisdiction, under the Oklahoma paving law, because said petition fails to show that intervener has an interest in the subject-matter of the action—the proceeds from the sale of the lots which the County Treasurer was enjoined from selling. The Oklahoma paving law, as

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affirmatively appears throughout appellant's appeal proceedings, requires the issuance of a series of paving bonds upon each paving district, to be consecutively numbered from 1 to —, as may be required to cover the total cost of paving that district, and the bonds are to be paid in their numerical order out of any collections made from any and all lots in that district, so that assessments collected from any particular lot cannot be applied to any particular bond. Intervener holds bonds No. 34-39, but this Court has no way of knowing, and it cannot assume, that there was not and is not sufficient funds in the City Clerk's hands, collected from other lots in said district, with which to pay intervener's bonds in their numerical order, and from which said bonds would be paid upon request of intervener and surrender of his bonds. Therefore, the record fails to show that appellant, the intervener, is interested in the subject-matter of the action, and it is fundamental that the legal question presented on this appeal becomes moot, and the appeal should be dismissed. *City of Shawnee* v. *Taylor,* 132 Pac. (2d) 950; *Shinn* v. *Oklahoma City,* 184 Okla. 236; *German* v. *Myers,* 80 Pac. (2d) 624. The fact that intervener is not interested in the subject-matter, and that this appeal must be on behalf of unnamed third parties, is supported by the record fact of the numerous *amici curiae* reflected on the State Court opinion.

4. This appeal is frivolous, is only for delay, and the question upon which the decision depends needs no further argument, because that identical question and the constitutionality of such State limitation statutes as the one herein attacked, has been repeatedly decided by this Court and by all other courts of the Nation against appellant's contention, universally holding: That a lien and a statute of limitation are parts of the remedy, and not the right, and that a new statute, creating or changing a limitation,

and extinguishing the lien when no action is taken to enforce the lien within the time allowed, when a reasonable time to do so is given in the new statute, does not violate the obligation of any contract. Both Federal and State decisions, as well as general texts, are too numerous to cite, but we shall presently cite and quote from decisions of the U. S. Supreme Court to show the force, the emphasis, the unanimity and the universality of that doctrine. The law was stated in *Wheeler* v. *Jackson,* 137 U. S. 245, 34 L. ed. 659, and has never been overruled or departed from, as follows:

> "2. The Legislature may shorten the time within which suits to enforce existing causes of action may be commenced, provided a reasonable time be given by the new law for the enforcement of such suits before the bar takes effect.
>
> "3. The statute of limitations does not impair the obligation of a contract, nor deprive one of property without due process of law, unless in its application to an existing right of action it unreasonably limits the opportunity to enforce that right by suit."

The same rule is adopted in the following cases:

Federal Cases: *Wheeler* v. *Jackson,* 34 L. Ed. 659; *Mitchell* v. *Clark,* 28 L. Ed. 279; *Town* v. *Burton,* 26 L. Ed. 886; *Terry* v. *Anderson,* 24 L. Ed. 365; *Campbell* v. *Hold,* 29 L. Ed. 483; *Land Co.* v. *Williams,* 66 L. Ed. 559; *Siebert* v. *U. S.,* 122 U. S. 284, 30 L. Ed. 1161; *Meyer* v. *City of Eufaula* (Okla.), 132 Fed. (2d) 648; *Meyer* v. *City of Eufaula* (Okla.), 154 Fed. (2d) 943; *Wood* v. *Lovett,* 313 U. S. 362, 85 L. Ed. 1404; *Honeyman* v. *Jacobs,* 306 U. S. 532, 83 L. Ed. 972; *Richmond Mtg.* v. *Wachovia Bank,* 300 U. S. 124, 81 Fed. 552, 108 A. L. R. 886; *Home Building* v. *Blaisdell,* 290 U. S. 398, 78 L. Ed. 413, 88 A. L. R. 1481; *Versluis* v. *Town of Haskell* (Okla.), 154 Fed. (2d) 935; *U. S.* v. *Moreeno,* 245 U. S. 392, 62 L. Ed. 359; *Anderson* v. *Luckeet,* 321 U. S. 233, 88 L. Ed. 692, 151 A. L. R. 824; *Atchafalya Co.* v. *Williams,*

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258 U. S. 190, 66 L. Ed. 559; *Lamb* v. *Powder River*, 132 Fed. 434.

State Cases: *Mulvey* v. *City of Boston*, 83 N. E. 402; *Woodbury* v. *Grimes*, 1 Colo. 100; *Bangor* v. *Goding*, 56 Am. Dec. 688; *Haynes* v. *Wadey*, 41 N. W. 222; *Jones* v. *Coal Creek Mining & Mfg. Co.*, 180 S. W. 179; *Merriweather* v. *Board*, 150 Okla. 223; *Adams* v. *Kenoyer*, 116 N. W. 98; *Wooster* v. *Bateman*, 102 N. W. 521; *Melborn* v. *Kelley*, 145 Pac. 816; *Tipton* v. *Smythe*, 8 An. Cas. 521; *Best* v. *Baumgartner*, 1 L. R. A. 356.

General Texts: 12 Am. Jur. 86, 89; 34 Am. Jur. 19-25; 8 Cyc. 1005, 997, 995; 12 C. J. 1057, 978; 6 R. C. L. 367, 369; 17 R. C. L. 680, 672.

This rule is so generally and universally followed as the correct rule of law that the C. C. A., in the Oklahoma paving case of *Meyer* v. *City of Eufaula* (Okla.), 154 Fed. (2d) 943, said:

> "Insofar as we can ascertain, a legislative imposition of a reasonable limitation upon the time in which a right may be exercised *has never been considered an unconstitutional impairment of the right.* A limitation of time, even upon the assertion of a right theretofore having no limitation upon its assertion, or a different limitation, is not infrequent, and its legality is unquestionable if a time reasonable, in view of the subject-matter be given." Citing numerous U. S. Supreme Court decisions.

The right to change the remedy, or to assert or change the limitation of time, is an essential attribute of sovereign power which is always reserved, and in *Home Building* v. *Blaisdell*, 290 U. S. 398, 435, 78 L. Ed. 413, 88 A. L. R. 1481, the U. S. Supreme Court said:

> "Not only are existing laws read into contracts in order to fix obligations as between the parties but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order."

This rule is not only followed by the courts of this country but its justice and wisdom extends to all the world, so says the United States Supreme Court in *Land Company* v. *Williams*, 66 L. Ed. 559, as follows:

> "And such is the rationale of the statute of limitations. Their requirement is that the rights and obligations be asserted within a prescribed time. If that be adequate the requirement is legal, and its justice and wisdom have the testimony of the practices of the world."

5. Appellant's "Jurisdictional Statement" reflects a clever and ingenious attempt to hide and suppress his foregoing admission, and attempts to avoid and skip that part of the 1939 law which proves its validity under the decisions of all the courts, by repeatedly making the erroneous statement that the entire 15 sections of Senate Bill No. 164 (the 1939 Act) are involved in this case, when the record clearly shows that only Section 1 of that Act is involved. On pages 3-4 of the typewritten "Jurisdictional Statement" where he attempts to quote said Section 1, he purposely omits the vital and middle part of said section, the part which preserves its validity, and here is the part he omitted:

> "Provided, however, that in all cases where the period of limitation herein mentioned has expired or will expire prior to November 1, 1939, the holder of such bonds shall have until December 1, 1940, in which to pursue his remedy or obtain the benefits of this act."

With reference to said omitted part the State Supreme Court opinion appealed from said:

> "Those whose rights were barred by the 3 year provision at the time the law became effective, or whose rights would be barred by November 1, 1939, were given 18 months after the effective date of the Act

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within which to pursue all such remedies. We think it is clear that, under the authorities just cited, it cannot be said that there was a contractual obligation not to impose a statute of limitations upon such remedy, and it was within the power of the Legislature to do so."

And that opinion further says, which is true in fact:

"We do not understand that it is contended by the defendant, the intervener or amici curiae, that the time allowed is unreasonably short."

As a matter of law the time question is a discretion of the Legislature, and not a court question. From an examination of the cases we find that anywhere from 30 days to 18 months is held to be a reasonable time, but in 6 R. C. L. 367 it is said:

"The question as to what shall be considered a reasonable time within which an existing right must be asserted after the new statute of limitations is enacted, before the statute will bar the right, is for the determination of the Legislature, and is in no sense a judicial question."

In *Gilbert* v. *Acreman*, 53 N. E. 753, the New York Supreme Court said:

"It is the almost universally recognized doctrine, the principle being so firmly settled that we deem further citation of authority unnecessary."

In the opinion appealed from, referring to *Hann* v. *City of Clinton* which the court had already criticized and refused to follow in *Groom* v. *City of Bristow, supra,* but which *Hann* case appellant continues to cite, it was further said:

"The court in Hann *v.* City of Clinton, 131 Fed. (2d) 978, cited no authority in support of its holding that the 1939 Act is unconstitutional, and apparently gave

no consideration to the above cited authorities, probably because its attention was not called to them."

Said opinion states that the true rule is stated in the U. S. Supreme Court, *Richmond* v. *Wachovia Bank*, 300 U. S. 338, as follows:

> "The Legislature may modify, limit, or alter the remedy for enforcement of a contract without impairing its obligation, but in doing so it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right. The particular remedy existing at the date of the contract may be altogether abrogated if another equally effective for the enforcement of the obligation remains or is substituted for the one taken away."

In 12 Am. Jur. 86 it is said:

> "A lien created by statute for the payment of a debt is only a part of the remedy afforded by the law for its collection; a change of that remedy does not affect the obligation of the contract."

6. The 63 page "Jurisdictional Statement" is so extremely excessive, containing so much argument, repetition, immaterial and useless matter, that it confuses both Court and counsel, and it should be stricken and the appeal dismissed upon that ground. The immaterial parts of the 1939 law not here involved cover 10 pages of said statement. The dissenting opinion of Judge Gibson, the only dissent of the Court of 9, constitutes no official part of the record, yet it covers 13 pages of the Jurisdictional Statement. Appellant's "Comparative Statement of the Bondholder's Rights", and his discussion of those parts of the 1939 Act which are not material to Section 1 involved herein, are also extremely confusing and immaterial.

In his "Jurisdictional Statement" appellant says the 1939 Act is not a "limitation" but an "extinguishment"

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of his bond, but such contention is like the argument that "black is white and white is black", because the act itself states its name, its substance and purpose, as follows:

> "An Act fixing limitations upon the time in which the lien of a street improvement bond . . . may be enforced by court action or otherwise."

And it was held in *City of Bristow* v. *Groom, supra,* that the 18 months allowed the bondholder in which to pursue his remedy:

> "Was intended to protect the act from an attack on constitutional grounds by giving a reasonable time for bondholders to pursue their existing remedy."

The validity and usefulness of Section 1 of said 1939 Act, and its construction and application by the State Supreme Court, is recognized by the 1947 Legislature in repealing all of the Act except said Section 1 involved herein. *See page 217 of 1947 Session Laws.*

To sustain his jurisdictional claim appellant cites and quotes *City of Healdton* v. *Pickins,* decided by the Oklahoma Supreme Court January 6, 1948 (not yet reported), but such is an example of all cases cited by them. The 1939 Statute involved in this case was not involved in any way in that case. The opinion so states:

> "It appears that the 1939 Act (11 O. S. 1941, Sec. 242) has no application to defendants' contentions against the assessment liens here involved. Defendants specifically do not rely on that Act and so state. Therefore, we do not discuss that Act or consider it in any manner."

It is also well to remember that a paving lien created under Oklahoma law is not a "contract", but it is a liability created by a statute. *City of Chickasha* v. *O'Brien,* 58 Okla. 46; *City of Bristow* v. *Groom,* 194 Okla. 384. It

has never been claimed that there is any constitutional prohibition against impairing a "liability created by statute." In the *Chickasha* case, *supra*, the court said:

> "But the liability of the defendant in error to pay the assessment complained of does not arise out of a contract, and is not a debt, but, on the contrary, such liability is imposed by the municipality in the exercise of the taxing power which has been delegated to it by the State."

And in the *Groom* case, *supra*, the court held:

> "An action to foreclose a special assessment lien . . . is an action on a 'liability created by statute'."

If for any purpose Judge Gibson's dissenting opinion should be read or considered then we call attention to his concurrence in *Case* v. *Penick*, 186 Okla. 217, and what he said in upholding this 1939 law in a former opinion of the court written by him in *Town of Shattuck* v. *Barcarfer*, 137 Pac. (2d) 238 as follows:

> "The purpose was to relieve the real property from stale lien claims arising under the bonds. That intent is clearly revealed by the portion of said Sec. 242 as follows: 'The running of the period of limitation herein fixed shall be an absolute bar to any action or proceeding brought thereafter, whether the same is plead as a defense or not, and the property against which such bonds theretofore represented a lien shall thereafter be, by operation of law, absolved of any lien or liability on account of said bond."

WHEREFORE, we respectfully contend that jurisdiction should be denied, or that the appeal be dismissed or the decision of the State Court be summarily affirmed.

A. J. WELCH,
MILTON KEEN,
JAMES F. HANING,
Attorneys for Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 618

A. F. REEDER,

Appellant,

vs.

W. F. BANKS, ERNEST NORRIS, COUNTY TREASURER OF WASHITA COUNTY, OKLAHOMA,

Appellees

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

APPELLEE'S SUPPLEMENTAL STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS APPEAL OR AFFIRM STATE COURT OPINION.

Filed in Supreme Court of Oklahoma, Feb. 13, 1948. Andy Payne, Clerk.

Statement of Facts

7. The appellee, W. F. Banks, was the owner of certain lots in the City of New Cordell, Oklahoma. Special assessments were levied against the lots pursuant to legally

enacted resolutions and ordinances in the year 1929 creating Street Improvement District No. 8 of the City of New Cordell. The assessments were payable in ten annual installments, the last being in 1939. The street improvement bonds to secure which the assessments were levied, all matured in the year 1939. The assessments were levied and bonds issued under the "1923 Act" of the Oklahoma Legislature appearing as 11 O. S. 1941, Secs. 103 *et seq.* On the same year the special assessment bonds matured, the Oklahoma Legislature enacted the "1939 Act" being 11 O. S. 1941, Sec. 242, which provided that the holder of a special assessment bond could not enforce the lien of any street improvement bond by "foreclosure, mandamus, refunding, or otherwise" after the lapse of three years immediately following the maturity date named in the face of the bond; that if the bondholder did not commence his action within the 3 year period the property "against which such bonds theretofore represented a lien" should be absolved of any lien or liability on account of said bonds by operation of law; that the holders of the bonds which were already delinquent more than three years at the time of the passage of the act should have a period of 18 months and 19 days from date of passage of the 1939 Act within which to bring an action to enforce the collection of their bonds. The appellant, A. F. Reeder, held some of the bonds issued against Street Improvement District No. 8, of the City of New Cordell. He brought no action to enforce collection of his bonds, which bore 7% interest before maturity and 12% after maturity, either by foreclosure, mandamus against the County Treasurer of Washita County, refunding or otherwise. In October of 1945, some six years after the passage of the 1939 limitations act above referred to, Vernon Baccus, the predecessor of the appellee, Ernest Norris, caused a notice to be published that he would sell the property of the appellee, W. F. Banks, at

the November, 1945 tax sale to satisfy delinquent paving assessments which had been past due for more than seven years. This action was taken under the old provision of the Oklahoma Statutes commonly known as the "1923 Act" and appearing at 11 O. S. 1941, Sec. 106. The appellee, W. F. Banks, on October 29, 1945, then filed in the District Court of Washita County, Oklahoma, his "Petition for injunction" seeking to enjoin the County Treasurer from selling his property for delinquent assessments and enormous penalties on the ground that the lien of the assessment had expired and was extinguished by the failure of the holders of special assessment bonds to pursue their remedies within the time prescribed by the 1939 Act (11 O. S. 1941, Sec. 242). The appellant, A. F. Reeder, intervened in the case claiming that he was the owner of certain bonds in Paving District No. 8 of the City of New Cordell, that 11 O. S. 1941, Sec. 242 was "unconstitutional" (he did not state whether the Federal or State constitutions was violated) and an attempt to impair the obligation of contract. No Bond or Copy of a Bond Was Attached to the Pleadings of the Appellant in the Trial Court or Offered in Evidence. The trial court held 11 O. S. 1941, Sec. 242 of the "1939 Act" constitutional and issued its temporary and then its permanent injunction preventing the County Treasurer from selling the property of Mr. Banks. Sections 242-a to 242-e of Title 11 O. S. 1941 were not in issue at any stage of the proceedings in the trial court or the Supreme Court of the State of Oklahoma.

The Supreme Court of the State of Oklahoma on October 28, 1947, affirmed the opinion of the trial court in the case as then entitled, *Baccus, County Treasurer, et al.* v. *Banks*, with only one dissent out of a court of nine justices and in syllabus No. 5 held:

> "The existing limitation statutes do not ordinarily enter into and become a part of the obligation of con-

> tracts, and the Legislature may shorten such period so long as a reasonable period remains."

and in Syllabus No. 6 held:

> "Statutes of limitation may be made to apply to existing contract rights against which there were no such statutes in existence at the time they were created, provided a reasonable time is allowed for their enforcement, and such statutes do not violate the constitutional provision against impairment of the obligation of contracts."

The Court then continues in Syllabus No. 7 to approve the "reasonable time" allowed by the Legislature in the following language:

> "The period of time allowed in 11 O. S. 1941 Sec. 242 (18 months and 19 days) for the enforcement of existing contract obligations which had been due more than three years or which were to be due more than three years by November 1, 1939, was not unreasonable."

and holds in Syllabus No. 8 that:

> "11 O. S. 1941 Sec. 242 did not deprive owners of special assessment bonds of any of the remedies they previously had."

In Syllabus No. 9, the Supreme Court of Oklahoma then held:

> "The Legislature may, in enacting a statute of limitations make it effective to take away both the remedy and the right and make it applicable to existing contract rights, so long as the period of limitations is reasonable."

and concludes in Syllabus No. 10 that no constitutional rights of the appellant, either State or Federal, have been impaired, using the following language:

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"The provision of 11 O. S. 1941 Sec. 242, that the running of the period of limitation therein fixed 'shall be an absolute bar to any action or proceeding brought thereafter, whether the same is plead as a defense or not, and the property against which such bonds theretofore represented a lien shall thereafter be, by operation of law, absolved of any lien or liability on account of said bonds', is but a part of, and is intended to make effective, the statute of limitations therein, and the same does not unconstitutionally impair the obligation of the contract, nor does it violate the due process clause or the equal protection clause of either the State or Federal Constitution."

It is from this "final judgment" in the "highest court of a state" from which the appellant is appealing. Appellees, both Banks, the property owner, and Baccus, the County Treasurer, regret the obvious necessity of a rather extended statement of fact—necessary because of the confusing, immaterial, and redundant Assignment of Errors and Jurisdictional Statement of the Appellant herein.

The Record Fails to Show That Any Federal Question Involving the Obligation of Contracts Was Necessarily Decided by the Oklahoma Supreme Court.

8. The United States Supreme Court held in the cases of *Detroit United R. Co.* v. *Michigan*, 242 U. S. 238, and *Georgia R. & Power Co.* v. *Decatur*, 262 U. S. 432, that when the Supreme Court is called upon in the exercise of its jurisdiction to decide whether the State Legislation impairs the obligation of a contract, the Supreme Court exercises its independent judgment upon the following questions: (1) Was there a contract? (2) If so, what obligation arose from it? (3) Has that obligation been impaired by subsequent legislation?

Despite the bald statement of Appellant that "there is no question but that appellant's bonds * * * constitute

a contract", appellee suggests there is considerable doubt that there was a contract involved in this action at all. The case of *Bristow* v. *Groom*, 194 Okla. 384, 151 P. 2d 936, decided *after* the *Hann* v. *City of Clinton* case cited by Appellant, holds:

> "An action to foreclose a special assessment lien . . . is an action on a 'liability created by statute' . . ."

In the early case of *City of Chickasha* v. *O'Brien*, 58 Okla. 46, 159 Pac. 282, the Supreme Court of Oklahoma said:

> "But the liability of the defendant in error to pay the assessment complained of does not arise out of a contract, and is not a debt, but, on the contrary, such liability is imposed by the municipality in the exercise of the taxing power which has been delegated to it by the State."

The United States Circuit Court of Appeals in the case of *Verslius* v. *Town of Haskell*, 154 Fed. (2d) 935, also decided *after* the *Hann* v. *Clinton* case, recognizes that the problem here is the duration of a "liability created by statute" and holds that the three year general statute of limitation in Oklahoma, appearing at 12 O. S. 1941 sec. 95 (2), is applicable to a foreclosure action to enforce that liability.

Assuming, however, but without admitting, that there was a contract between the bondholder and the property owner, What Obligation Arose from the Contract? Was it that the bondholder had a perpetual right to sit idly by accumulating a penalty of 12 per cent per annum? It was not. In the *Baccus* v. *Banks* decision of the Oklahoma Supreme Court now before this Court, it was held:

> "It is from the provision that the lien shall continue until the assessments are paid that the duration of the lien is determined. But, as pointed out in Moore *v.* State, 43 N. J. L. 203, 39 Am. St. Rep. 559, the reason

> that limitation laws do not become a part of the obligation of contracts is that Parties Look to Performance and Not to Breach of Their Contracts. The substantial obligation of the contract was that the bondholder should receive his money with interest when the bonds matured, and not that he could delay indefinitely taking steps afforded him for the performance of his rights."

In determining the meaning of a contract and whether its obligation has been impaired by State legislation, the decision of the State Supreme Court is very persuasive as to the meaning of the statute. *Larson* v. *South Dakota*, 278 U. S. 429. It is to be noted also that it was a State statute (the "1923 Act," 11 O. S. 1941, Sec. 103 *et seq.*) which gave rise to the alleged contract right appellant claims to have been unconstitutionally impaired by a subsequent State statute, 11 O. S. 1941, Sec. 242. The U. S. Supreme Court has ruled that it will follow more closely State interpretation of statutes which are claimed to create contractual rights than it does where the alleged contractual right arises from the State constitutions. *Phelps* v. *Board of Education*, 300 U. S. 319; *Hale* v. *Iowa State Board of Assessment*, 302 U. S. 95.

The obligation which arose from the contract, if such there be, was, then, (1) that the bondholder should receive his money when the bonds became due and (2) in the event of the failure of the property owner to pay the assessment from which the bondholder was paid that the bondholder could enforce payment by (a) tax sale and resale procedure under 11 O. S. 1941 Sec. 106, and (b) foreclosure in the district court as provided by 11 O. S. 1941 Sec. 107. There was no constitutional or statutory guarantee that the bondholder should have a perpetual lien as he claims. His claim, unlike Tennyson's brook, did not run on forever. In fact, appellant's claim to perpetuity of his lien is contrary to the

basic constitutional law of Oklahoma appearing as Article 2, Sec. 32 of the Oklahoma Constitution as follows:

> "Perpetuities and monopolies are contrary to the genius of a free government and shall never be allowed • • •"

It is not contended by appellant that either of the methods of enforcing his right to have his bond paid were abrogated by the "1939 Act," (11 O. S. 1941, Sec. 242), but merely that the perpetuity of his lien is impaired. (The State Court said: "The 1923 statute does not say that the lien shall be perpetual. It is only by process of reasoning that such a contention can be made.") It is to be noted also that the appellant in this case was not even restricted to the 18 months and 19 days time allowed by 11 O. S. 1941, Sec. 242, for the bringing of an action where the three year limitation period therein prescribed had already run. Appellant's bond became due on March 17, 1939, and the effective date of the 1939 Act, 11 O. S. 1941, Sec. 242, was in May, 1939. Appellant had three years from March 17, 1939, to enforce collection but refused to act.

Conclusion: It is the duty of the Appellant to show that a contract question was necessarily decided by the Oklahoma Supreme Court. In this he has failed, as he has also failed to show that there was (1) a contract, (2) the obligation of that contract and (3) that the obligation has been impaired. The decision of the Oklahoma Supreme Court was based upon a local or State question. Appellant has failed to show that the Federal question of impairment of obligation of contract was necessarily decided in order to reach the conclusion reached by the Oklahoma Supreme Court and under such circumstances the universal rule of the United States Supreme Court is to dismiss the appeal or affirm the decision of the State Court. *Eustis* v. *Bolles,* 150 U. S. 361; *Pierce* v. *Somerset Railway,* 171 U. S. 641.

There is not a showing by appellant that a Federal right is even involved, thus requiring dismissal; *Campbell* v. *Olney*, 262 U. S. 352.

The United States Supreme Court follows State statutes and laws as established by decisions of the State; *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

The appeal should be dismissed and the appeal affirmed.

The Record Fails to Show That Any Federal Questions Involving a Denial of Due Process of Law or Equal Protection Were Necessarily Decided by the Supreme Court of Oklahoma.

9. These questions were never seriously urged by appellant in the State Supreme Court. They were not even raised in the trial court. They are merely attempting to throw another "bone" in the judicial mill. It is obvious that appellant was not deprived of his property "without due process of law" because he was given his day in court by remedies of foreclosure and mandamus and even if the three year period of limitations imposed by 11 O. S. 1941, Sec. 242, had run on appellant's bonds, which was not the case, he was allowed approximately 19 months within which to pursue his remedy. It is obvious also that 11 O. S. 1941, Sec. 242, does not deny him "equal protection" because the only other entity with which he seeks the equality of perpetuity is that of the sovereign.

The Record Does Not Present for Decision Any Substantial Federal Question for the Reason That Identical Questions Have Been Decided Adversely to Appellant's Claims by the United States Supreme Court.

10. The decision of the State Supreme Court was consistent with the basic law of the State of Oklahoma existing long before the "1923 Act," which was enacted, to-wit: 42 O. S. 1941, Sec. 23, which provides:

> "A lien is extinguished by the mere lapse of time within which under the provisions of civil procedure an action can be brought upon the principal obligation."

The case of *Coakley* v. *Phelan*, 179 Okl. 515, 66 Pac. (2d) 19, is one of the several cases construing the above statute. In that case the Court called attention to the fact that the Oklahoma statute above quoted is exactly opposite the statutes of most other States. They usually provide that "a lien is *not* extinguished by the mere lapse of time," etc. The case of *Bertram et al.* v. *Moore*, 160 Okl. 78, 15 Pac. (2d) 589, says that 42 O. S. 1941, Sec. 23, means exactly what it says and that the lien lapses and is extinguished if no proceedings are brought to enforce it within proper time. Starting with the case of *Gray* v. *Deal*, 50 Okl. 94, 151 Pac. 205, the Supreme Court of Oklahoma has consistently held that there is no such thing in Oklahoma as a dormant lien and that when the remedy is gone the lien is gone; when the remedy is gone the property is *ipso facto* absolved of the lien. The law regards the diligent as a matter of public policy.

The State Court points out in the *Baccus* v. *Banks* opinion that appellant does not even contend that the legislature cannot shorten existing limitation statutes without impairing obligation of contracts. Appellant contended, as reflected in the opinion of the State Court, that it was that portion of 11 O. S. 1941, Sec. 242 which absolved the property of the lien that made the act unconstitutional. But appellant does not here contest the constitutionality of 42 O. S. 1941, Sec. 23, *Supra*, and it should be obvious that under that statute the lien was "extinguished by the mere lapse of time within which under the provisions of civil procedure an action can be brought upon the principal obligation" for the simple reason that the 1939 Act *did* enact a limitation period within which under the provisions

of civil procedure an action could be brought for the enforcement of the obligation. It is immaterial, therefore, whether the 1939 Act "absolved the property of the lien" because under 42 O. S. 1941 Sec. 23, which is not here contested, and the decisions of the State Court, the property was *ipso facto* absolved of the lien by the running of the limitation period enacted by the 1939 Act. That portion of 11 O. S. 1941, Sec. 242, which absolved property of the lien after the running of the limitations period therein provided, was merely a legislative restatement of what was already the law of the State. The questions raised by appellant are, therefore, moot and the appeal should be dismissed without consuming the time of the Court.

The decision of the Oklahoma Supreme Court was consistent with the rule stated in 48 Am. Jur. Sec. 226, P. 745, under the title, "Special or Local Assessments," to-wit:

> "The provisions of a statute under the authority of which special assessments are levied, that such assessments shall constitute a lien 'until the same are paid and discharged' does not make the lien a perpetual one so as to preclude the applicability of a statute of limitations to an action to enforce it."

The decision was consistent with *Wheeler* v. *Jackson*, 137 U. S. 245 and follows the universal rule expressed at 34 Am. Jur. p. 27, Sec. 18, as follows:

> "The Legislative body may, without violating constitutional guaranties, enact statutes which limit the time within which actions may be brought to enforce demands where there was previously no period of limitations, or which limit, change, and vary existing rules as to limitation of actions either by shortening or extending the time within which a cause of action may be asserted."

It was consistent with the following cases: *Benton Turner* v. *People of the State of New York*, 168 U. S. 89:

> "1. A statute shortening the period of limitation is within the constitutional power of the legislature, provided a reasonable time, taking into consideration the nature of the case, is allowed for bringing an action after the passage of the statute and before the bar takes effect."
>
> "2. A limitation of six months after the passage of a statute, within which actions for lands sold for taxes may be brought, is not repugnant to the constitution of the United States."

George S. Wheeler v. *Theodore F. Jackson*, 137 U. S. 245:

> "2. The Legislature may shorten the time within which suits to enforce existing causes of action may be commenced, provided a reasonable time be given by the law for the commencement of such suits before the bar takes effect."
>
> "3. A Statute of Limitation does not impair the obligation of a contract, nor deprive one of property without due process of law, unless, in its application, to an existing right of action, it unreasonably limits the opportunity to enforce that right by suit."

National Surety Company v. *Architectural Decorating Company*, 226 U. S. 275:

> "1. The existing remedy for the breach of the obligation of a contract may be changed without violating the contract clause of the Federal Constitution, so long as a substantial and efficacious remedy remains, even though the contract, so far as pertains to its obligations, may be of statutory origin."

Terry v. *Anderson*, 95 U. S. 628, 24 L. Ed. 365, is another leading case on this subject. In that case a suit was brought to enforce the liability of a stockholder in a bank. The State of Georgia had passed an act which barred all causes of action which accrued prior to the close of the Civil War. The suit was to compel a stockholder in a bank to pay a liability created by the charter of the bank which bound the property of the individual stockholders for the redemption of the bills of the bank. At the time the liability was incurred the limitation was twenty years. It was contended that that period could not be shortened for the reason that the obligation of a contract would be impaired in contravention of the Constitution. The Supreme Court held otherwise. The Court held that a limitation could be shortened if a reasonable time is given for the commencement of an action before the bar takes effect. In that case, the Court said:

> "Here nine months and seventeen days were given to sue upon a cause of action which had already been running nearly four years or more."

The opinion then quotes the section and after another sentence says:

> "Already the holders of such bills had had nearly four years within which to enforce their rights. Ever since the close of the war the bills had ceased to pass from hand to hand as money, and had become the subject of bargain and sale as merchandise. Both the original billholders and the stockholders had suffered from the same cause. The business interests of the entire people of the State had been overwhelmed by a calamity common to all. Society demanded that extraordinary efforts be made to get rid of old embarrassments, and permit a reorganization upon the basis of the new order of things. This clearly presented a case

for legislative interferences within the just influence of constitutional limitations. For this purpose the obligations of old contracts could not be impaired, but their abandonment claimed. That, as we think has been done here, and no more. At any rate there has not been such an abuse of legislative power as to justify judicial interference. As was said in Jackson *v.* Lamphire (Supra) 'The time and manner of their operation (statutes of limitation), the exceptions to them, and the Acts from which the time limited shall begin to run, will generally depend upon the sound discretion of the legislature, according to the nature of the titles, the situation of the country and the emergency which leads to their enactment.'' *Jackson* v. *Lamphire* is in 3 Peters 280, 7 L. Ed. 679.

The conditions revealed by the Oklahoma Supreme Court decision almost duplicate the conditions revealed in *Terry* v. *Anderson.* The Oklahoma Court said in its opinion:

> ''At the time of the enactment of the act in question, the delinquent special assessments for street improvement purposes had piled up in most of the cities and towns of the state, until the properties in many instances were not worth the amount of the delinquent taxes and special assessments standing against them, rendering the properties unmarketable.
>
> • • • • • • •
>
> ''The act was passed to remedy this condition by compelling bondholders to take steps to enforce their rights within the time limited, and barring actions and proceedings and absolving the properties from the statutory liens if they failed to do so.''

Conclusion

The constitutional questions attempted to be raised by appellant are foreclosed by previous decisions of this Court

and are so unsubstantial and frivolous as to justify the motion to affirm, if not the motion to dismiss.

Respectfully submitted,

A. J. WELCH,
Clinton, Oklahoma;
MILTON KEEN,
Clinton, Oklahoma;
JAMES F. HANING,
Wewoka, Oklahoma;
MALCOLM ROSSER,
Muskogee, Oklahoma;
RICHARD S. MARTIN,
Muskogee, Oklahoma;
GILBERT H. BOND,
Duncan, Oklahoma,
Attorneys for Appellees, W. F. Banks.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 618

A. F. REEDER,

Appellant,

vs.

W. F. BANKS, ERNEST NORRIS, COUNTY TREASURER OF WASHITA COUNTY, OKLAHOMA,

Appellees

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

MOTION TO DISMISS APPEAL OR AFFIRM DECISION OF STATE COURT

Comes now the appellee, W. F. Banks, and moves to dismiss the appeal herein for the reason that the appellant fails to comply with the Rules of the United States Supreme Court: fails to show that any Federal question involving the obligation of contracts, due process of law, or equal protection clauses of the Federal Constitution were necessarily decided by the Supreme Court of Oklahoma; and he

further moves, if the motion to dismiss is not granted, that this Court affirm the decision of the Oklahoma Court for the reason that the questions on which the appellant relies are so unsubstantial and frivolous as to need no further argument, all as appears in the statement opposing jurisdiction filed herewith.

A. J. Welch,
Clinton, Oklahoma;
Milton Keen,
Clinton, Oklahoma;
James F. Haning,
Wewoka, Oklahoma;
Malcolm Rosser,
Muskogee, Oklahoma;
Richard S. Martin,
Muskogee, Oklahoma;
Gilbert H. Bond,
Duncan, Oklahoma,
Attorneys for Appellee, W. F. Banks.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 618

A. F. REEDER,
Appellant,

VERSUS

W. F. BANKS; ERNEST MORRIS, County Treasurer of Washita County, Oklahoma,
Appellee.

PETITION FOR REHEARING

LOCKWOOD JONES,
ARNOLD T. FLEIG,
W. R. BANKER,
SOLON W. SMITH,
Counsel for Appellant.

APRIL, 1948.

KING LAW BRIEF COMPANY, 418 NORTHWEST THIRD, OKLAHOMA CITY—PHONE 3-2969

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INDEX

	PAGE
Preliminary Statement	1
Grounds for Petition for Rehearing	3
Authority:—	
Article 1, Section 10, Constitution of the United States	2
Seibert v. Lewis, 122 U.S. 284, 30 L. ed. 1161	5
Senate Bill 164, 1939 Session Laws of Oklahoma, Page 156, Sections 242 to 242c, Title 11, O.S.A.	3
Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403	5
Wheeler v. Jackson, 137 U.S. 245	5
Conclusion	7
Certificate of Counsel	7

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IN THE SUPREME COURT OF THE UNITED STATES

No. 618

A. F. REEDER,
Appellant,

VERSUS

W. F. BANKS; ERNEST MORRIS, County Treasurer of Washita County, Oklahoma,
Appellee.

PETITION FOR REHEARING

To the Supreme Court of the United States and the Justices Thereof:

Comes now A. F. Reeder, the appellant in the above entitled cause, and presents this, his petition, for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

PRELIMINARY STATEMENT

Inasmuch as the order of the Court merely states the appeal is dismissed for lack of a substantial federal ques-

tion, the appellant, of course, is unable to ascertain what were the ground or grounds for dismissal. It is, therefore, necessary for us to assume that this Court found the federal question devoid of merit either because (a) the appeal was predicated on false assumptions; or (b) the federal question urged was contrary to the established law; or (c) only a state question was involved.

The grounds enumerated in our petition for rehearing will, therefore, be aimed at each of the three grounds on which this Court may have relied. We are, of course, mindful of the fact that the Court has carefully considered our jurisdictional statement. We are also mindful of the gap between the Supreme Court bench and the Bar as to what statutes will be declared unconstitutional. In this case, however, we respectfully urge that the gap is not so much between the bench and Bar as between the "bench and the bench," as it were. Thus, MR. JUSTICE GIBSON of the Oklahoma Supreme Court, making the same assumptions that we made in presenting our appeal, found the 1939 Act, which we assailed, clearly violative of Article 1, Section 10, of the United States Constitution, and believed the question to be of the gravest importance, justifying an extended and logical dissenting opinion. Further, the United States Circuit Court of Appeals for the Tenth Circuit unanimously held that said act impaired the obligation of contract in violation of Article 1, Section 10, of the United States Constitution. It is apparent from

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the language of the Circuit Court of Appeals that the Act was patently unconstitutional in their judgment.

With this background and with the experience that counsel in this case have had in this highly specialized field for many years, we think it understandable that we would suppose the federal question to be of such substance as to require consideration by this Court. We believe, therefore, that we must have failed to adequately present this matter to this Court, because we are still of the opinion that the 1939 Act (Senate Bill 164, 1939 Session Laws of Oklahoma, Page 156, Sections 242 to 242c, inclusive, Title 11, O. S. A.) is a clear if ingenious and subtle device for breaching a solemn obligation.

We submit the following grounds for our petition:

1. The Court failed to give full consideration to the provisions of statute entering into the contract between the bondholders and the City of New Cordell, for the levy and collection of the special assessments.

2. The Court failed to give full consideration to the fact that the special assessments or special taxes were the sole source of payment of appellant's bonds, and were not an obligation of the city, notwithstanding the fact that the bonds were issued by the city.

3. The Court failed to consider that the term "special assessment lien" is misleading in that the so-called lien only secures the special assessment itself, and is not security for any other or further general obligation; and thus a withdrawal of our lien is a withdrawal of the only right we possessed for the collection of the bonds.

4. The Court failed to consider that the assessment or tax consisted of two inseparable parts: (1) the levy or assessment; and (2) the proceedings for the collection of the assessment by tax sale — so that a withdrawal of the latter amounted automatically to an extinguishment of the former.

5. The Court failed to consider that a statute of limitations may only operate on the remedy incidental to a contract; and the only remedy given to the bondholder for foreclosure of his lien was a judicial proceeding, with which we are not concerned.

6. The Court failed to consider the distinction between the remedy exercisable by a bondholder in a judicial proceeding which he controls, and the duties prescribed by legislation for a governmental official in the conduct of a tax sale.

7. The Court failed to recognize that a tax sale proceeding in Oklahoma is not in any way contractual in nature but is governmental.

8. The Court failed to give consideration to the fundamental injustice of penalizing the bondholder by extinguishing his contractual right by reason of the fault of third parties, to-wit: by reason of the dereliction of the county officials in failing to conduct the tax sales.

9. The Court failed to recognize that the county treasurer had no personal interest in selling property for special assessments and was, in effect, excused from doing so by the 1939 Act, which imposed no penalty on the

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county treasurer for failure to conduct a tax sale, but at the same time, rewarded the property owner with a lien extinguishment.

10. The Court failed to consider that, inasmuch as the collection of special assessments could not be hindered when the contract provides for collection in the same manner as general taxes [*Seibert* v. *Lewis*, 122 U. S. 284, 30 L.ed. 1161], the Legislature could not, therefore, destroy the special assessment lien; a withdrawal of the tax sale proceeding being a withdrawal of the most substantial element of the right itself, and not a change or withdrawal of a remedy.

11. The Court failed to give proper consideration to *Von Hoffman* v. *Quincy*, 4 Wall. 535, 18 L.ed. 403, in which the Court held that the state could not disable itself from executing a power in trust promised under prior legislation.

12. The Court failed to observe that the withdrawal of the right to conduct the tax sale in the 1939 Act was a greater impairment than the cancellation of a portion of the tax in *Von Hoffman* v. *Quincy*.

13. If the Court based its decision on *Wheeler* v. *Jackson*, 137 U.S. 245, then the Court failed to distinguish between a limitation placed upon a right exercisable by an individual and a limitation placed upon a governmental act as in the 1939 Act.

14. The Court failed to consider that the sole source of payment, to-wit: the special assessments, are an invol-

untary tax and a so-called limitation on the tax collecting powers is simply a legislative sanction or consent to a repudiation of these assessments.

15. The Court failed to give consideration to the fact that a so-called limitation on the power of tax sale amounted to a promise to the taxpayer that his property would be absolved of the lien of special assessments without giving to the bondholder any means of gaining fulfilment of his contract.

16. The Court failed to give consideration to the fact that said Act did not serve the public welfare but was simply a means of enabling the state to break the bondholders' contract.

17. If the Court based its dismissal of our appeal upon the ground that the sale is only a remedy, which we deny, then the Court erred in failing to recognize that said so-called remedy was in reality a means of activating or effectuating the special assessment tax, and the withdrawal of said tax sale was in reality simply an extinguishment of the lien *in futuro*.

18. The Court failed to give consideration to the fact that the contract provided for under the Oklahoma laws for the collection of these special assessment bonds was unique in that the special assessment lien was of equal dignity with the *ad valorem* tax lien.

19. The Court failed to give consideration to the fact that the vested right of the state to change remedies and impose statute of limitations was expressly precluded

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by the Legislature with reference to the special assessment liens by the provision of the statute under which these liens were created promising co-equality with *ad valorem* tax.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted, and that the order of the Court dismissing appeal be rescinded, and the judgment of the Supreme Court of the State of Oklahoma be, upon further consideration, reversed.

Respectfully submitted,

LOCKWOOD JONES,
ARNOLD T. FLEIG,
W. R. BANKER,
SOLON W. SMITH,
Counsel for Appellant.

APRIL, 1948.

CERTIFICATE OF COUNSEL

We, counsel for the above-named appellant, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

LOCKWOOD JONES,
ARNOLD T. FLEIG,
W. R. BANKER,
SOLON W. SMITH.

MARCH 29, 1948.

Decisions Per Curiam.

No. 618. REEDER *v.* BANKS ET AL. Appeal from the Supreme Court of Oklahoma. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want

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of a substantial federal question. *Solon W. Smith* for appellant. *Milton Keen* for appellees. Reported below: 199 Okla. 647, 192 P. 2d 683.